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NEW FEDERAL SCHEMES TO SOAK UP WATER AUTHORITY: IMPACTS ON STATES, WATER USERS, RECREATION AND JOBS

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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OVERSIGHT HEARING ON NEW FEDERAL SCHEMES TO SOAK UP WATER AUTHORITY: IMPACTS ON STATES, WATER USERS, RECREATION AND JOBS

Tuesday, June 24, 2014
U.S. House of Representatives
Subcommittee on Water and Power
Committee on Natural Resources
Washington, DC

The subcommittee met, pursuant to notice, at 10:00 a.m., in room 1324, Longworth House Office Building, Hon. Tom McClintock, [Chairman of the Subcommittee] presiding.

Present: Representatives McClintock, Lummis, Tipton, Gosar, Labrador, LaMalfa, Smith, Byrne, Hastings (ex officio); Napolitano, Costa, Huffman, DeFazio (ex officio).

Mr. MCCLINTOCK. The Subcommittee on Water and Power will come to order.

The Water and Power Subcommittee meets today to hear testimony on a hearing titled "New Federal Schemes to Soak up Water Authority: Impacts on States, Water Users, Recreation, and Jobs."

I will begin with 5-minute opening statements by the committee, and the Chair will begin.

STATEMENT OF THE HON. TOM MCCLINTOCK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MCCLINTOCK. The subcommittee meets today in response to urgent protests made by a wide range of state and local governments, farmers, ranchers, and public land users, and private land owners in response to threatened action by the EPA and the Forest Service to vastly expand their authority over water use at the expense of long established state jurisdictions, rights and prerogatives and in direct violation of the constitutional separation of powers.

This subcommittee met 2 years ago to discuss how the Forest Service planned to extort ski areas of their water rights in exchange for operating permits. The House passed a bill to remedy that.

Now the Forest Service threatens through executive fiat to assert management control over "surface and groundwater resources that are hydraulically interconnected and to consider them interconnected in all planning and evaluation activities." It also asserts Federal supremacy over state water rights not only on national Forest Service land, but on adjacent lands that could conceivably affect the Federal lands.

The unconstitutional and illegal assertion of such authority would impose Federal riparian rights in direct violation of current Federal law. It overturns western state doctrines of prior appro-

priations that have guided water policy in those states for more than 150 years. As we will hear, the economic impact of this action is devastating to those states.

Meanwhile, the EPA now threatens, again through executive fiat, to vastly increase its jurisdiction over virtually all water in the United States. The Clean Water Act provided the EPA with jurisdiction only over navigable waters. In 2010, then-Congressman Oberstar proposed legislation to delete the term "navigable waters," to vastly redefine "Waters of the United States". The Democratic majority in that Congress declined even to hear the bill. Under a Constitution that gives Congress exclusive authority to legislate, the EPA now threatens to change the law itself to vastly increase its power and jurisdiction.

By this act, the EPA is seizing control over virtually every body of water in the United States, including many agricultural and drainage ditches, ornamental lakes, conduits people use for water recycling, and small creeks and streams, including those that exist only during heavy runoffs.

What this means in practice is the Forest Service and the EPA can, under these proposals, require cost-prohibitive Federal permits for any proposal tangentially affecting virtually any body of water in the United States.

What this means constitutionally is that legislative power exclusively assigned to Congress has now passed unrestricted to the Executive, including the power to repeal existing laws, such as the McCarran Amendment that guarantees to states supremacy in establishing and enforcing the water rights within their jurisdictions, and the power to amend laws, in direct defiance of Congress, including changing the fundamental terms of executive jurisdictions.

These proposals not only threaten to upend 150 years of state water laws, but to present us with a constitutional crisis the significance of which cannot be overstated. To add arrogance to injury, the Agencies responsible for these proposals have refused the invitation of this subcommittee to explain themselves and their conduct, submitting at the last minute fatuous and wholly unresponsive written testimony.

Their absence speaks volumes about their lack of defense for these proposals and makes a mockery of this administration's pledge for transparency.

These proposals must be withdrawn, and there is bipartisan support to do just that. Many Democrats have joined Republicans to urge this administration to withdraw the "Waters of the U.S." proposal. Chairman Hastings and many members of the Natural Resources Committee and the House and Senate Western Caucus are sending a letter today urging the Agriculture Secretary to withdraw its Forest Service Groundwater Directive.

We will pursue legislation through both the appropriation and authorization powers of Congress to stop this unconstitutional and illegal overreach.

I believe that these proposals open a new chapter in executive agencies running amuck, seizing powers by their own edicts that have been specifically denied them by the legislation that created them in the first place. They fundamentally alter the relationship between the legislative and executive branches, and the relation-

ship between the states and the Federal Government, all in a manner wholly antithetical to the structure and construct of our system of checks and balances and of the sworn duty of every official to abide by the laws and the Constitution.

With that I yield back the balance of my time and recognize the Ranking Member, Mrs. Napolitano, for 5 minutes.

STATEMENT OF THE HON. GRACE F. NAPOLITANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

Today's hearing focuses on the two proposed rules by the administration, the proposed definition of "Waters of the United States" under the Clean Water Act, and the Forest Service's Groundwater Directive.

I am proud to serve on this subcommittee as well as the Water Resources and Environment Subcommittee and on the Transportation and Infrastructure Committee. The Transportation Committee's Water Resources Subcommittee has jurisdiction over the Clean Water Act, not Natural Resources.

I attended the Water Resources Subcommittee hearing 2 weeks ago regarding the administration's proposed rulemaking on the term "Waters of the United States." Some of the topics being brought up by witnesses today had already been totally addressed at the Transportation and Infrastructure hearing, and some of the issues have also already been addressed in last week's Agricultural hearing. This will be the third time we will be discussing many of these same concerns.

While I support the proposed "Waters of the United States" rule, I also know that the rule is complex and complicated. Numerous stakeholders have raised valid concerns, and I repeat, valid concerns, about the potential implications of this particular rule or rules. We want to help our constituents to get the clarity they need to alleviate their concerns.

Both the "Waters of the United States" and the Forest Service's Groundwater Directive are not final. Both are in the process of public comments. EPA recently announced that the public comment for the "Waters of the United States" will be extended through October of this year, and we urge all of the witnesses who are interested to provide public comment in this process or be part of the process and submit your comments so that the agencies may fully consider all of the concerns.

I would also ask that as you finalize your comments that you share them with this committee so that we may also better understand your concerns. It is really important for all of us to be able to have information on both sides so that we can better deal with this issue here in Congress.

And I thank you for our witnesses, to all of them, for being here today. I hope you have a good trip going home.

Thank you, and I yield back.

Mr. MCCLINTOCK. The Chair is now pleased to recognize the Chairman of the Natural Resources Committee, Chairman Doc Hastings of Washington.

STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. HASTINGS. Thank you, Mr. Chairman, and thank you for the courtesy in allowing me to participate in your subcommittee hearing.

Today's examination of how proposed Federal regulations will impact multipurpose land and water uses on and off Federal lands is important when it comes to protecting and expanding our water and power supplies.

Republicans on the Natural Resources Committee have pursued an "all of the above" agenda not only on energy, but for water supply also. Our efforts to provide future supplies from new or expanded water storage, canals, conservation, and efficiency through common sense regulatory improvements and financial incentives is the exact opposite approach that has been taken by this administration.

We can foster water development for people and species if the Federal Government chooses not to erect hurdles to new projects. Yet the two proposals in front of us—the EPA's "Waters of the United States" and the Forest Service's new Groundwater Directive do nothing more than make it more difficult to rehabilitate or build new projects that benefit agriculture, municipalities, species, and habitat.

Our witness before us today, Mr. Larry Martin, who lives and works in the Yakima Valley in my Central Washington District and representing the National Water Resources Association will testify today about the benefits of the Yakima River Integrated Water Resource Management Plan.

This diverse, stakeholder-based approach could provide new and expanded water storage to help both people and fish in that part of Washington. Yet, you will hear today the Forest Service top-down Groundwater Directive could, and I quote, "delay or derail the implementation of this vital, innovative, and broadly supported plan" because the reservoir improvements are on Forest Service lands.

To make matters worse, EPA's "Waters of the U.S." proposal could shut down development on a broad scale outside of Federal lands. We are told that the proposal does not impact irrigation districts, canals, ditches. Yet this Washington, DC-based regulation has so many ill-defined terms in its regulation that it will make it much easier for litigious groups to sue and, therefore, stop such projects, even projects such as conservation and efficiency projects.

This administration's mantra seems to be that if it flows, even for a few weeks out of the year, then it must be regulated by the Federal Government. Yet the administration's failure to defend these proposals to the American people and to this subcommittee today is telling. It is telling especially so in the face of the water and power experts before us who must live on the front lines of Federal regulations every day.

So I commend the witnesses for traveling here today to enlighten this committee and, by extension, the House of Representatives on how such ill-conceived regulations would add cost to consumers and may actually harm the environment, and I commend the Subcommittee Chairman for holding this hearing.

And I yield back my time.

Mr. MCCLINTOCK. I thank the Chairman.

The Chair now recognizes the Ranking Member of the House Natural Resources Committee, Mr. DeFazio of Oregon, for 5 minutes.

STATEMENT OF THE HON. PETER DEFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. DEFAZIO. I thank the Chairman.

I would just like to put a little bit of why we are here today in context. When I was a kid, the Willamette River in Oregon was an open sewer, and back East they actually had signs posted at bridges when you drove over them saying "Flammable object below. Do not throw lighted objects, i.e., cigarettes, from bridge." Those were rivers, and they caught fire, most famously the Cuyahoga and others.

So the Nation came together and we adopted the Clean Water Act. The Clean Water Act has never been reauthorized. I was involved in an exercise in 1994 on the Transportation, then called the—gosh, I do not know. It has changed its name a number of times—Public Works Committee, I think, and it was back in the days when we really legislated or attempted to. It was in 1995 actually. The Republicans had taken over, and it was their version of a bill. It went on for 5 days, dozens and dozens of amendments and debate.

The bottom line of the bill they proposed, which never was brought to the Floor because it was a very radical change, was that users should be responsible, not polluters. That was rejected back then.

So I think there is consensus that we want to prevent pollution. We want to prevent degradation. We want to prevent wetland loss and all the associated problems with that. It is an immensely difficult, complicated issue. You know, we have had two Supreme Court cases. We have had guidance and then we have had new guidance, and then we have had a former proposed withdrawn rule, and now we have a proposed rule.

So what I caution the witnesses here today is, this is a proposed rule. That means that it is out for comment. The comment period has been extended. I welcome you to provide us specifics today about problems. There are problems, I believe, with some definitions in the bill, but I am hearing about problems that are no longer covered by the bill.

Specifically, I raised a whole issue about rills and basically runoff, gullies, rills, et cetera, which I felt in the former guidance and in some former proposed legislation by our deceased colleague, Jim Oberstar, I think would have been covered. In Oregon it rains a lot, and we have sloat. Those would have been specifically exempted.

Some other things seem to have been exempted, but they are not really defined. So we are not sure if they are exempted, and those things merit, many things merit exemption. Ornamental ponds, those things seem to have been taken care of, but I am still hearing about that.

So I want to hear about real problems with the proposed rule and things that are common sense that need to be changed, sim-

plified, clarified so that we do not end up in court again. We do not want to go to court again. We want to protect our waters. We want to protect our wetlands. We want to provide for future generations, and you know, lawyers can get plenty of other business out there. Let us get this one right.

So those are the kinds of concerns and comments I would like to hear today and in the ensuing couple of months before the comment period closes, productive ideas, not just like "no," you know, "no, no." "No" is not helpful, but here is a problem with what you are doing and how it relates to farming. Here is a problem with forestry. Here is a problem with power production, all legitimate activities.

I mean, if there is a problem with wastewater, which I think they may have taken care of, but again, it is a very complicated rule with the handling of wastewater and water recycling and that; I think they have taken care of it, but maybe there is some point that they have not really taken care of exempting those activities. So those are the sorts of comments I would like to hear today.

With that, Mr. Chairman, I thank you for the time.

Mr. MCCLINTOCK. The Chair is now pleased to recognize the gentleman from California, Mr. LaMalfa, for 5 minutes.

STATEMENT OF THE HON. DOUG LAMALFA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. LAMALFA. Thank you, Mr. Chairman.

I appreciate this hearing today. It is very timely and very key from what we hear are some proposals out there. It is important that we do this because I believe the EPA is attempting to seize control of virtually all land use in the United States through this extremely creative interpretation of the law.

The EPA views the rule so expansive that the draft included an exemption for puddles, which has since been removed. Does this mean the administration now intends to regulate puddles? It certainly appears to be the case.

It is especially interesting to see the administration use the Clean Water Act as part of the pretext to expand its jurisdiction as it routinely ignores this law in its day-to-day activities. We have seen Federal agencies, none of whom bothered to show up today, attack activities that are specifically exempted in the Act, exempted in the Act from regulation, particularly farming activities like maintaining irrigation systems.

An example we have in northern California, a family's effort to shift from ditch irrigation to a more efficient pipe irrigation which one would think this administration would like and support, water efficiency and all of that. This effort was stymied when Federal agencies argued that the work would somehow negatively impact the Sacramento River. Never mind that the Sacramento River is 7 miles away from this project. Any possible sediment runoff effect could be collected, would be collected in a manmade pond that the family has on their property with no outlet from that pond. So there is no connection between these fields and a 7 mile away river. The family is forced to spend thousands of dollars to fight regulations that do not even exist on this.

We have seen the administration splitting hairs to a ridiculous degree when it comes to other exempted agriculture activities, especially plowing fields. It has decided in some cases plowing to a certain depth is, in fact, not plowing despite the fact the tool used for the work is a plow.

Mr. Chairman, it is not an exaggeration to say that the administration's proposal would insert Federal control into land use decisions in virtually all of California and the Central Valley. The proposed "Waters of the United States" rule would give the Federal Government control over every tributary of every navigable water and tributaries to those streams and even unconnected bodies of water which are adjacent to such waters.

The administration also claims control over every area of dry land that is subject to inundation under moderate to high flows, which effectively would include the entire Central Valley. Again, a lot of room for interpretation, "subject to inundation under moderate to high flows," what does that even mean?

Combining these areas with the riparian areas along every natural or artificial tributary to navigable rivers and their tributaries, which would include every waterway in the Central Valley and certainly most waterways in the Sierra Nevada and Cascade Mountain ranges. You begin to get a picture of the impact we are talking about.

The rule would create Federal control of a vast portion of the state, including areas far from any waterway considered to be navigable. There is a word that really needs to be defined or re-defined in my opinion, "navigable."

Do Americans truly want the Federal Government to decide whether they can remodel their home or landscape their backyard? Do Americans want the Federal Government deciding that some plowing is not actually plowing? Do Americans want the Federal Government in the guise of unelected, unaccountable bureaucrats that do not tend to show up in front of the people's elected body, to decide that they cannot operate a business, maintain roads, clear brush or simply continue farming the land as they have always done for generations?

This is a proposed rule that the people need to weigh in upon. We do need to say "no" to proposed rules. "No" can be helpful because they do not enforce the rules, the laws right as it is now, not consistently and not where people are landowners that come and complain to me about, could not even tell what they are supposed to do to comply. They do not hear back for months. They cannot get definitive answers, and yet this group wants to move forward and regulate to an even wider range than what they have right now. They do not follow their own rules.

Mr. Chairman, I do not believe that is what the American people want. So I yield back. Thank you.

Mr. MCCLINTOCK. The chair now recognizes Mr. Smith of Missouri for 5 minutes.

STATEMENT OF THE HON. JASON SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. SMITH. Thank you, Mr. Chairman. Thank you for convening this hearing today on two key issues facing my constituents, the so-

called "Waters of the United States" rule currently being advanced by the EPA and the Corps of Engineers, and the Forest Service Groundwater Directive.

I want to thank the witnesses who took the time to be here today, including Mr. Roger Clark from Missouri. Roger is the Director of Engineering and Operations of Associated Electric Cooperative in Springfield, Missouri.

Associated, through their member cooperatives, is the source of electricity for most of my constituents.

These witnesses' presence today stands in stark contrast to the Federal agencies charged with either proposing these rules or having to live them who failed to even show up today. If this administration cannot be bothered to explain these proposed regulations to this committee and answer simple questions from Republicans and Democrats in front of this panel of assembled experts, how can we expect them to explain these regulations to our affected constituents? They cannot and they are not.

I have joined with my colleagues and other members of this committee to ask the administration to withdraw both the proposed "Waters of the United States" rule and the new Forest Service groundwater rule. If this administration is not prepared to explain or defend these rules today, then perhaps it is time that these rules were withdrawn.

To call these issues important to my constituents would be an understatement. Water is everywhere in southeastern Missouri. Much of my district used to be a swamp, but now that it has been drained, it is one of the most productive and diverse agriculture areas in the Nation. We grow everything but citrus and sugar.

Agriculture is the number one industry in Missouri and about one-third of Missouri's agriculture income is produced in the seven Boot Hill counties in the Eighth Congressional District which used to be swampland. Instead of a swamp, there are now over 1,000 miles of manmade ditches draining 1.2 million acres of farmland.

Applying the Federal permitting process to every pond, gully, dry creek bed, irrigation ditch, puddle or other similar collection of water would be a huge increase in our regulatory burden. The government regulators claim that these are exemptions in the rules for these ditches and other manmade collections of water, but these exemptions are not well defined leaving many to believe that they may not be exemptions clearly at all.

I have many questions about these so-called exemptions and how they would apply. Unfortunately, this administration did not send anyone here today to answer any questions.

In addition to this rich agriculture area of southeast Missouri, my district also contains large sections of the 1.5 million acre Mark Twain National Forest. The Forest Service groundwater rule that we are discussing today would require consideration of the effects on the groundwater resources on Forest Service lands of all proposed and authorized groundwater uses prior to the authorization or re-authorization of their use.

Additionally, the Directive assumes that groundwater and surface water have a hydrological connection. What does this mean? If these rules go through as is, now the Forest Service, the EPA, and the Corps of Engineers may all get involved in regulating a

drainage ditch that only holds water 2 months out of the year because there is a hydrologic connection between the ditch and the groundwater in the Mark Twain National Forest.

Let me remind you that my district has around 1,000 miles of these ditches. These rules are so vaguely written and so expansive that if they were proposed by anyone other than this administration, I might be shocked. Unfortunately, this process has become all too familiar.

I hope that this hearing today will help to further the case that these regulations are executive overreach in its worse form and that they should be withdrawn immediately before they have the chance to severely harm the farmers, small business owners, and individuals in my district that use and work on a daily basis their land.

Thank you, Mr. Chairman. I yield back the remainder of my time.

Mr. MCCLINTOCK. I thank the gentleman.

If there are no further opening statements, we will now hear from our panel of witnesses. Each witness's written testimony will appear in full in the hearing record. So I would ask witnesses to keep their oral statements to 5 minutes as outlined in our invitation letter to you under Committee Rule 4(a).

We have some helpful timing lights to keep you within those parameters. The yellow light indicates there is 1 minute remaining, and the red light indicates that your time has expired.

Before we begin, I would like to note that Forest Service Chief Tom Tidwell and Mr. Lowell Pimley, the Acting Commissioner of the Bureau of Reclamation, were invited to testify at today's hearing, as I indicated in my opening statement and Mr. Smith referenced. The administration has provided witness statements from these agencies, yet failed to provide a witness to answer any questions stemming from that testimony.

That said, I now recognize Mr. Lawrence Martin, the attorney at the Halverson Northwest Law Group and representing the National Water Resources Association from Yakima, Washington, to testify.

You are recognized for 5 minutes.

STATEMENT OF LAWRENCE MARTIN, ATTORNEY, HALVERSON NORTHWEST LAW GROUP, YAKIMA, WASHINGTON, REPRESENTING THE NATIONAL WATER RESOURCES ASSOCIATION

Mr. MARTIN. Thank you, Mr. Chairman and members of the subcommittee. Thank you for giving me the opportunity to appear today.

My name is Larry Martin. I am here on behalf of the National Water Resources Association. NWRA represents state associations, irrigation districts, other water providers, and their collective interests in the management of irrigation and municipal water supplies in the western states.

We fully support the need for keeping our water safe and clean, not only for purposes of crop production, but also for drinking water and fish and wildlife habitat.

I will focus on the proposals regarding the definition of the "Waters of the U.S." and management of U.S. Forest Service groundwater, but I must mention that these are only two of the pending rules. Water users are also struggling to review and comprehend Forest Service directives on BMPs and ski area water rights, and three other draft rules and policies related to the Endangered Species Act.

All of these proposals have the potential to seriously impact water users. These are not easy reads. They are highly technical documents that cited numerous studies.

The proposed "Waters of the U.S." rule continues to expand Federal and legal jurisdiction to the detriment of local communities and water users who rely on the efficient delivery of water for crops, jobs and our economy. The agencies may claim the proposed rule will provide clarity to regulated entities. That assertion is contradicted by the imprecise terms contained in the rule.

Despite its length, the proposal creates more questions than answers on whether a minor body of water is a "Water of the U.S." and has the potential to expand Federal jurisdiction over thousands, if not millions, of acres.

Compliance with permitting requirements can take years and cost many thousands of dollars. These costs cannot be avoided because the Act imposes criminal liability and civil fines on a broad range of ordinary activities.

We do commend the agencies with proposing exemptions from Federal jurisdiction. However, the uncertainties in some of the definitions provide only vague answers as to whether certain waters will be excluded. Every year irrigation districts, water companies and farmers perform routine maintenance work on thousands of miles of canals and ditches. If required to obtain a permit for each such activity, these routine activities will become anything but routine.

One of my clients is in the Sunnyside Valley Irrigation District (SVID) in the Yakima Valley. It serves nearly 100,000 acres of the most productive farm ground in the Nation growing hops, apples, cherries, grapes, mint, and other important food crops. SVID has received numerous awards for its environmental and conservation activities. Its conservation project has increased efficiencies to its farmers, plus will return over 43,000 acre-feet per year for ensuring flows to the Yakima River.

Despite its leadership, SVID was the unfortunate subject of the uncertainty regarding "Waters of the U.S." SVID was performing routine maintenance to fix an erosion and a drainage issue in a ditch. This activity is likely performed on an almost daily basis by other irrigation providers in the West. The Corps advised SVID the ditch was subject to jurisdiction and was told to return the ditch back to its original, but not working condition. The Corps added that in its opinion, the work performed on the ditch was not necessary.

After 4 years of negotiation, numerous meetings, and trips to Washington, DC to meet with EPA and the Corps, and the issuance of a new regulatory guidance letter, SVID was eventually advised its work on the ditch did not require a permit.

Similar situations to SVID's experience will continue to occur until there are clear definitions distinguishing between jurisdictional waters. Irrigation ditches were never intended to be considered a "Water of the U.S.," and the final rule should expressly provide that exclusion.

Similarly, reclamation and reuse facilities should also be exempt. I have submitted for those reclamation facilities in California which under the proposed rule will likely now be jurisdictions.

NWRA is also concerned with the new Forest Service Groundwater Directive which is contrary to longstanding Federal policy respecting the roles of states and private property rights in regulating groundwater. This directive was developed without any meaningful outreach to water users, many of which have existing water systems on Forest Service lands.

The Directive would place additional permitting requirements on water infrastructure and will make meeting current and future needs and responding to climate variability more difficult and expensive.

We are also concerned that the Forest Service will attempt to tie permit approval to the modification of a state-issued water right and has the real risk of jeopardizing the integrated plan in the Yakima Basin. NWRA members will continue to meet their obligations to provide an efficient and safe water supply and remain dedicated to the protection of our natural resources.

Unfortunately the rules expand Federal jurisdiction, imposing additional regulatory burdens on water suppliers.

On behalf of NWRA's members, I thank you for your attention to the critical water supply issues.

[The prepared statement of Mr. Martin follows:]

PREPARED STATEMENT OF LAWRENCE E. MARTIN, ATTORNEY, HALVERSON NORTHWEST LAW GROUP, YAKIMA, WASHINGTON, SUBMITTED ON BEHALF OF THE NATIONAL WATER RESOURCES ASSOCIATION

INTRODUCTION

Chairman McClintock, Ranking Member Napolitano, and members of the subcommittee, thank you for giving me the opportunity to appear before you today, and for your attention to the many water challenges facing our Nation. My name is Larry Martin and I am here on behalf of the National Water Resources Association; more commonly known as NWRA. NWRA represents state associations, irrigation districts, other water providers, and their collective interests in the management of irrigation and municipal water supplies in the western states. NWRA members provide clean water to millions of individuals, as well as families, agricultural producers and other businesses. For more than 80 years our members have worked to provide water in a manner that provides both economic and ecosystem benefits to communities in the West.

NWRA and its many members are stewards, dedicated to the efficient management of water supplies; one of our country's most important resources. I am the Co-Chair of the Regulatory Committee for NWRA, and serve as a member of the Federal Affairs, Water Quality, and Litigation Task Forces. NWRA has long been involved in matters regarding the administration of the Clean Water Act ("Act" or "CWA") and its interpretation by the Courts, and regularly provides briefings for Congressional staff. NWRA is committed to working with the agencies to provide a clearly defined, efficient process for all permitting requirements.

NWRA members have historically been, and will continue to be supporters of the goals of the Clean Water Act. NWRA members fully understand and support the need for keeping our waters safe and clean, not only for purposes of crop production, but also for drinking water, fish and wildlife habitat, and recreational uses. To further those goals, NWRA members continue to make necessary improvements to their systems to increase efficiencies, conservation, and environmental protections.

In my testimony this morning I will focus on the recently proposed rule regarding the definition of the "Waters of the United States" and its impacts on Bureau of Reclamation customers. I will also discuss a U.S. Forest Service groundwater proposal that, as currently drafted, has the potential to undermine state rights, increase the cost of water, and make meeting future water supply needs more difficult.

I have limited time today, so I will focus my comments on the Clean Water Act and groundwater proposals. But I would do the committee and water users a disservice if I failed to mention that these are only two of the numerous pending rules, regulations, or policies proposed by the agencies that are currently out for comment. As I sit here today water users are struggling to review, comprehend, and comment on:

- Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act
- Proposed Directive: Proposed Directive on Groundwater Resources Management, Forest Service Manual 2560
- Proposed Directive: Proposed Directives for National Best Management Practices for Water Quality Protection on National Forest System Lands
- Proposed Rule: Ski Area Water Rights on Forest Service Lands
- Proposed Rule: Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat
- Draft Policy: Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act
- Proposed Rule: Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat

All of these proposals are currently open for comment and have the potential to seriously impact water users. These provisions are not easy reads; they are highly technical documents that cite numerous studies, which in some cases are not even finalized. As an example of the kind of document we are reviewing, let me read one sentence from the "Definition of Destruction or Adverse Modification of Critical Habitat." It states: "Therefore, an action that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability, to an extent that it appreciably diminishes the conservation value of critical habitat relative to that which would occur without the action under going consultation, is likely to result in destruction or adverse modification." This is just one sentence from the hundreds of pages of regulations currently out for comment.

All of these regulations have come out within the last few months, the same time that many of NWRA's members are busiest, focusing on irrigating, planting and growing crops that feed and clothe our Nation. I do not understand how the agencies expect our Nation's farmers and ranchers to meaningfully review and comment on all of these regulations. We want to work collaboratively with our Federal partners to provide meaningful comment, but the sheer mass and complexity of these regulations makes that charge exceedingly difficult. We have asked for extensions or will ask for extensions to all of these comment periods in coming weeks. I hope the agencies will heed this request; otherwise I fear this recent flood of regulation will drown agricultural and municipal water users in red tape.

NWRA POSITION ON PROPOSED RULE ON "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT

The proposed rule by EPA and the U.S. Army Corps of Engineers (the Corps) continues to expand the historical scope of Federal jurisdiction under the Clean Water Act, and the various Court decisions interpreting the Act. This jurisdictional creep has been to the detriment of local communities and water users who rely on the efficient delivery of water for crops, jobs, and our economy. The reach and scope of the Clean Water Act's jurisdiction has kept EPA and the courtrooms busy. Despite the jurisdiction limitations contained in the original 1972 Act, and the judicial recognition by the U.S. Supreme Court in *SWANCC* and *Rapanos* that jurisdiction is not unlimited; the proposed rule goes beyond what was intended with the passage of the Clean Water Act.

The agencies may claim the proposed rule will provide clarity to regulated entities. That assertion is contradicted by the imprecise terms and broad definitions contained in the proposed rule, along with the agencies' statements that they will use their "best professional judgment and experience" to interpret the terms. In-

stead, despite its length, the proposal creates more questions than answers on whether a minor body of water is a "Water of the U.S." The primary question is why is it necessary to expand jurisdiction to local waters that have marginal connections to traditional navigable waters?

Another question is whether there is any appropriate cost/benefit balance to increasing jurisdiction over remote and intermittent waters? The proposed rule has the potential to expand categorical Federal CWA jurisdiction over thousands, if not millions, of acres of property, and will likely encourage litigation over the scope of the rule. If adopted as presently proposed, the rule will increase costs and regulatory burdens on farmers, business, private and public landowners, and state and local governments by expanding the types of water bodies that require CWA permits. The proposed rule will also increase the risk of citizen suits due to the expanding scope of jurisdiction and regulatory questions raised by the rule.

The proposed rule would change the Clean Water Act and dictate that the following waters will always be jurisdictional:

- All **tributaries**, including any waters such as wetlands, lakes, and ponds, that contribute flow, either directly or through another water, to downstream traditional navigable waters or interstate waters.
- All waters **adjacent** to such tributaries. The proposed rule broadly defines "adjacent" to include all waters located within the "riparian area" or "floodplain" of otherwise jurisdictional waters, including waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to jurisdictional water.
- All **man-made conveyances, including ditches**, would be considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark and flow directly or indirectly into a "Water of the U.S." regardless of perennial, intermittent, or ephemeral flow.

The extension of jurisdiction to these water features has implications for farming, permitting, land use options, and required mitigation. Water suppliers and private and public landowners will experience costs and delays associated with additional permits, restrictions on options, and the continued uncertainty on the scope of jurisdiction. Until the rule provides the specificity needed, persons will still be subject to the sometimes inconsistent interpretations offered by Corps of Engineer personnel. As often cited from the *Rapanos* decision, a 2002 study reported the average applicant for an individual permit spent 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. Close to $2 billion is spent each year by the private and public sectors obtaining wetlands permits. These costs cannot be avoided, because the Clean Water Act imposes criminal liability, as well as steep civil fines, on a broad range of ordinary activities. Expanding the scope of the Act to additional and uncertain jurisdictional water bodies will only increase those costs and delays.

We do commend the agencies with proposing categorical exemptions from Federal jurisdiction; however the uncertainties and lack of specificity in some of the definitions provide only vague answers as to whether certain waters will be considered excluded from the scope of "Waters of the U.S."

- For example, artificially irrigated areas that would revert to upland should water application cease are exempt, but there is no definite clarification as to what qualifies as an "upland."
- The proposed rule also properly excludes "groundwater" from its definition of "Waters of the United States," but it does not reconcile that exclusion with its inclusion of certain waters based on a "subsurface" (groundwater) connection.
- Other exclusions that are not clearly defined include: gullies, rills, non-wetland swales; and certain types of upland ditches, or those ditches that do not contribute flow to a "Water of the U.S." Again, key terms like "uplands" and "contribute flow" are undefined. For the people I represent, it is imperative that the rule define how currently exempt ditches will be distinguished from jurisdictional ditches. The proposed rule needs greater clarity, ensuring that the historic exemptions for irrigation ditches and associated infrastructure are retained.

I represent numerous irrigation districts, water companies, and farmers in Washington State. The most critical element to my clients' livelihoods is the reliable, safe, and efficient delivery of water for the production of food and crops. In 2011, the total production value for the 17 states comprising the western U.S. region

was about $171 billion; with about $117 billion tied to irrigated agriculture. There is approximately 42 million irrigated acres for the western United States.[1]

Irrigation water providers, and farmers that rely on those waters, use a distribution system of canals, ditches, and drains to move water efficiently and reliably for crop production. It is mandatory that such ditches be maintained in a proper manner. As the committee is well aware based on recent droughts, any lack of water during critical periods can be disastrous to crops, farmers, and our economy.

Irrigation ditches were never intended to be considered a "Water of the United States" and yet the proposed rule perpetuates the misconception. According to the majority opinion written by Justice Scalia in *Rapanos*; "Waters of the United States" was intended to be limited to "relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" Justice Scalia goes on to say that phrase does not include, "ordinarily dry channels through which water occasionally or intermittently flows." Nor are man-made irrigation and drain ditches to be included as "Waters of the United States."

Irrigation facilities such as canals and drains are distinct from natural waters both in their "nature" and their "purpose." Irrigation ditches are constructed conveyances regularly maintained for the purpose of delivering irrigation water or draining agricultural lands. The purpose of drain ditches is to remove the surface and subsurface flows that are present only because of the application of irrigation water. Irrigation and drainage facilities cannot fairly be characterized as either streams, rivers, lakes or other bodies of water forming natural geographical features. These are artificial facilities created for the purpose of irrigation and drainage. Normally, these channels would otherwise be dry, but for the application of irrigation water to produce crops.

Where irrigation drains carry water on a more permanent basis it is due primarily to groundwater that is not jurisdictional to the Clean Water Act. Most irrigation return flows return subsurface to irrigation drains. The Corps regulatory approach would appear to control drains, but if the continued flow in a drain is from groundwater, it is not surface water, and therefore not jurisdictional. Irrigation drains would not have the necessary surface connection with navigable waters, but for the groundwater contribution caused by irrigation return flows. Since the Clean Water Act is concerned with surface water and not ground water, the flow in irrigation ditches and drains does not meet the "significant nexus" requirement with navigable waters, and should be specifically and clearly excluded from permitting requirements.

The primary goal of any rulemaking should be to clarify the scope of the Federal agencies' jurisdiction under the Act. In particular, the agencies should make clear that irrigation canals, ditches and drains are not navigable waters, are not "Waters of the U.S.," and are not "tributary" to waters of the United States, consistent with the 1975 and 1977 regulations. The Act specifically excludes "return flows from irrigated agriculture" from the definition of "point source". 33 U.S.C. Sec. 1362(14); CWA Sec. 502(14). The Act also exempts "return flows from irrigated agriculture" from the NPDES permit requirements. 33 U.S.C. 1342(l)(1); CWA Sec. 402(l)(1). Similarly, permits for dredged or fill material are not required "for the purpose of construction or maintenance of . . . irrigation ditches, or the maintenance of drainage ditches". 33 U.S.C. Sec. 1344(f)(1)(C); CWA Sec. 404(f)(1)(C).

The words chosen by Congress and the intent of the Act are clear: irrigation canals, ditches, and drains were not meant to be regulated under the Clean Water Act. This was reflected in the 1975 and 1977 regulations, which provided that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States." 40 Fed. Reg. 31,321 (1975); 33 CFR 323.2(a)(5)(1982). This is the only practical approach for irrigation canals, ditches, and drains under the statutory scheme of the Clean Water Act. Congress has not expanded the Federal agencies' jurisdiction under the Clean Water Act since the initial regulations were promulgated in the 1970s. As a result, the Federal agencies should implement Congress' determinations in their rulemaking, through the inclusion of an express exemption for irrigation canals, ditches, and drains from the definition of navigable waters, "Waters of the U.S.," and tributary waters.

The Federal Government has a vested interest in seeing that its Federal reclamation facilities are maintained in a condition that allows irrigation districts to properly operate and maintain their facilities for the continued conveyance of agricultural waters, and the drainage of these waters, to protect the water users and the public from deterioration and failure of these facilities. Irrigation Districts and

[1] "The Economic Importance of Western Irrigated Agriculture" Water Resources—White Paper, prepared by Pacific Northwest Project, August 2013.

water providers maintain thousands of miles of canals and ditches and perform routine maintenance work in their conveyance facilities every year. If the Districts and water providers are required to obtain a CWA permit for each such activity, these routine activities would become exponentially more expensive, time consuming, and difficult. Irrigation Districts and water providers are also required to make more extensive improvements in the form of rehabilitation or replacement of some of the works from time to time. As demand for water in the West grows, water conservation activities such as lining or piping canals and drains are also commonplace activities. Without the ability to conduct these necessary activities, free from time consuming and costly Federal processes, agricultural water delivery, and many of the efforts aimed at improving efficiencies and conserving water, would be severely challenged, if allowed at all. Additionally, many of these facilities provide a flood control function. In such cases, regular maintenance activities to maintain channel capacity are necessary to protect life and property, and prevent serious flood damage to property. The proposed rule should focus on limiting the regulatory uncertainty of "Waters of the U.S." and jurisdiction, and not create unnecessary burdens on entities such as irrigation districts and water suppliers, whose purpose and facilities have no relationship to the originally envisioned scope of the Clean Water Act.

An increase in jurisdiction asserted by Federal agencies also increases the costs to the consumers—both agricultural and municipal users. This includes increased food costs to all, many of whom are least able to absorb the costs. These costs come without any real improvements in water quality and will likely divert resources away from improvements to other water quality issues.

SUNNYSIDE VALLEY IRRIGATION DISTRICT

One of my clients is the Sunnyside Valley Irrigation District ("SVID"). SVID serves nearly 100,000 acres of land in the lower Yakima Valley. It provides water to some of the most productive farmground in the Nation with its farmers growing apples, cherries, pears, grapes, mint, hops, and other important food crops.

Many years ago the Sunnyside Valley Irrigation District, along with the neighboring Roza Irrigation District joined together to voluntarily address water quantity and water quality projects. In a short 5-year period, 95 percent of the suspended sediment was removed from the return flows discharging back to the Yakima River. Twice the Irrigation Districts have received the State of Washington's Environmental Excellence Award. Additionally, SVID has participated in a multi-year conservation project through the Federal Yakima River Basin Water Enhancement Project Act. This conservation project has increased efficiencies to its farmers within the project, plus will return over 43,000 acre feet per year for instream flows to the Yakima River for purposes of fish and other environmental benefits. The conservation program by SVID has received broad support from all parties in the Yakima River basin and has been recognized with awards both locally and nationally.

Despite its leadership role in water conservation and improvements to water quality, SVID was the unfortunate subject of the uncertainty regarding "Waters of the United States" and jurisdiction by the Federal Government. In 2004, SVID was performing routine maintenance in a ditch within its system. Because the ditch had meandered over the years, it was creating erosion and drainage issues which needed to be fixed. The ditch was straightened and armored with rock to correct the problem. The activity performed by SVID was a routine action which is likely performed on an almost daily basis by other irrigation providers in the West. In SVID's 100 years of existence, at no time had it been advised that a Section 404 permit would be needed for such routine work. Later, a complaint was filed with the Army Corps of Engineers. The Corps investigated and advised SVID that project ditches were "Waters of the U.S." and therefore subject to the Corps' Sec. 404 permitting process.

SVID was advised by the Corps that SVID's only option was to return the ditch back to its previous improperly working condition, and any permit request by SVID to do the repair work was likely to be denied. Despite its lack of expertise in the management of irrigation waters, the Corps added that in its opinion, the work performed on the irrigation ditch by SVID was not necessary or justified. The Corps also advised SVID that virtually all of the operation and maintenance activities that take place on a daily basis are subject to Corps jurisdiction; meaning that even if such activities were to fall under an exemption, contact must be made with the Corps for them to make that determination. In other cases where permits could be required, it was made clear the Corps would not approve much of the regular and necessary work needed by the Irrigation District to maintain its canals and ditches, and that requesting a permit to do such work could be futile.

After 4 years of negotiation, numerous meetings and trips to Washington, DC to meet with EPA and the Corps, and the issuance of the Corps Regulatory Guidance

Letter 07–02, *Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act*; the Corps eventually advised SVID that its work on the ditch did not require a permit. SVID and other water suppliers can neither afford to wait 4 years nor afford the costs for determinations as to whether a permit is required.

We commend any attempt by the agencies to avoid similar circumstances from occurring again, but remain concerned the proposed rule contains uncertainties as to what is covered. Similar situations to SVID's experience will continue to occur until there are clear definitions distinguishing between jurisdictional waters. The final rule should expressly provide that waters in irrigation canals, ditches, drains and other conveyance facilities are not navigable waters, waters of the United States, or tributary waters, and, therefore, are not subject to the Federal agencies' jurisdiction under the CWA. This clarification is long overdue and we appreciate the Federal agencies' willingness to tackle this important issue.

EXEMPT WATER RECLAMATION, REUSE AND TITLE XVI FACILITIES

Reclaimed and reused water is a beneficial use that develops local water resources and reduces the demand for imported water. The processes for reclaiming and reusing water are costly, but are becoming increasingly feasible in areas of the country where groundwater and surface water sources are strained and the cost or availability of imported water are prohibitive. Water authorities across the country, especially those in the arid west, are investing millions of dollars in infrastructure to utilize this drought proof water resource. Treatment and distribution costs of recycled water are already high, making this valuable resource marginally cost effective in some places. Any significant increase in regulation will escalate the cost of utilizing this water and discourage its development.

Under the proposed rule, water reclamation and reuse facilities are not exempt from being designated waters of the United States. Ditches that transport effluent or discharged water can easily meet the definition of "tributary" under the proposed rule and be categorically regulated as waters of the United States. The proposed rule defines as a "tributary" any natural or man-made feature that has a bed, bank, ordinary high water mark, and conducts flow to another water. Reclamation and reuse facilities are frequently located in a floodplain or otherwise adjacent to jurisdictional water where all waters are categorically defined as waters of the United States. While the proposed rule includes an exemption for artificial lakes and ponds used exclusively for settling basins, such reuse facilities can function or take on the characteristics of a wetland and can receive and discharge water into surface ditches that are not exempt. The proposed rule's wastewater treatment exemption would not extend to an associated water reuse facility because such facilities are not expressly "designed to meet the requirements of the Clean Water Act," a condition stipulated in the rule that would not cover a beneficial use not addressed in the Act.

Western states like California acknowledge the value of recycled water and established a statewide goal (California Water Plan) of recycling 2.5 million acre feet of water by 2030. In 2009, .67 MAF was recycled; and increasing to 2.5 MAF is ambitious, but necessary to help drought-proof the state. Currently, 3.5 MAF of treated wastewater is being discharged to the ocean, and not beneficially reused.

Eastern Municipal Water District (EMWD), a water and wastewater agency in southern California utilizes nearly 100 percent of the recycled water it generates, and recycled water comprises 30 percent of its entire water supply portfolio—over 35,000 acre feet annually. With the assistance of the U.S. Bureau of Reclamation's Title XVI program, EMWD has developed 5,714 acre-feet of seasonal storage, five million gallons of elevated storage (to pressurize the system), 200 miles of recycled distribution water pipeline, and 19 pumping facilities. EMWD currently has greater demand than supply for recycled water and in response has prepared unique allocations for customers. Under the proposed rule, 10 EMWD recycled water storage sites would become jurisdictional because they are located in floodplains, are adjacent to jurisdictional water, and likely possess a subsurface hydrologic connection. After becoming jurisdictional, regular maintenance and vegetation removal of these 500 acres of ponds would require Sec. 404 permits. This added regulatory burden would not only increase the cost of recycled water, and potentially delay further development of recycled water storage ponds, but could hamper the development of this drought-proof water supply. Numerous agencies in the arid southwest share this scenario, concern, and dilemma.

Water reclamation and reuse facilities should be expressly exempt from this rule. Particularly in times of drought such as the one that currently affects most western states, developing new sources of water for consumption should be encouraged. This rule could discourage water reuse and interfere with the successful deployment of

Title XVI programs. Of equal concern is that the economic analysis that accompanies the propose rule completely ignores the potential impact on water reuse. NWRA recognizes that water recycling and groundwater recovery projects will greatly improve western states' water supply reliability and provide environmental benefits through effective water recycling and recovery of degraded groundwater. We appreciate the efforts of members on this committee who have worked to highlight the proposed rule's potential impacts on water recycling.

NWRA POSITION ON FOREST SERVICE GROUNDWATER MANAGEMENT DIRECTIVES

The EPA and Corps have consistently stated that they are not proposing to regulate groundwater. Unfortunately, it appears that the U.S. Forest Service ("NFS" or "Forest Service") is attempting to do just that. Its "Proposed Directive on Groundwater Resources Management" ("Directive") is extremely troubling to water users. As currently drafted, the Forest Service Directive unnecessarily expands the reach of the Federal Government into an area generally regulated by the states. In this Directive, the Forest Service notes that they will apply Federal reserved water rights under the Winters doctrine to both surface water and groundwater. We question this claim and believe that the Directive goes far beyond the Forest Services' legitimate authorities.

The Forest Service Directive is contrary to long standing Federal policy respecting the role of states in regulating groundwater. The proposal threatens states rights and could adversely impact private property rights. In addition, we are very concerned that this Directive was developed in a vacuum without any meaningful outreach to water users. While we appreciate the opportunity to comment on the Directive, the lack of transparency surrounding its development is concerning. During a meeting with congressional staff and stakeholders the Forest Service told NWRA representatives that this policy had been in development for 8 years. NWRA staff asked if the agency had reached out to water users to discus this proposal during that time. Agency personnel answered that no, they did not reach out to water users during that 8-year period.

The Directive would place additional permitting requirements on both existing and future water infrastructure. These permitting requirements would make meeting current and future water needs, and responding to climate variability, more difficult, more time consuming, and more expensive. The Directive would take water supply decisions out of the hands of water managers and put it in the hands of Forest Service employees who may have little or no experience in water management.

The Directive states that the Forest Service will: "Deny proposals to construct wells on or pipelines across NFS lands which can reasonably be accommodated on non-NFS lands." The rule does not define "reasonably." This requirement is excessively ambiguous and ignores the fact that water infrastructure can be constructed in a manner that benefits both people and the environment. Evaluating all alternatives could be a very time consuming process, and could delay already planned and vital water projects. There are few other "reasonable" alternatives to developing facilities off of NFS lands in the mountains of the western United States.

The Forest Service is openly embracing a policy that they know will directly increase water costs for people throughout the West.

The Forest Service also states that they will work to apply new permit requirements to new and existing groundwater wells and water pipelines. We are concerned that the Forest Service will attempt to tie permit approval to the modification of a state issued water right. The Forest Service has already attempted this in regard to ski area permitting and we are concerned that the agency will attempt to apply similar policies to water users.

Although the Directives provide for collaboration with other Federal agencies, such as experts from the USGS, state, tribal, and local agencies, and other organizations; noticeably absent is the Bureau of Reclamation, Irrigation Districts, and other water providers who are the largest distributors and users of water resources, many of which have existing water systems on Forest Service lands.

The Forest Service is also assuming the role of states by an evaluation of all applications not only on Forest Service lands, but also on applications on **adjacent** lands. There is no clear definition of "adjacent." If the Forest Service believes all waters are in hydraulic continuity, will they assert all state water right applications must be evaluated by the Forest Service regardless of the distance from their boundaries?

In the Yakima Basin, after decades of fighting resulting in inaction, water users representing agriculture; municipal; tribal; and environmental interests throughout the region put aside their differences to craft a water plan that meets everyone's

needs; the Yakima River Basin Integrated Water Resource Management Plan. The Yakima Integrated Plan provides both instream and out-of-stream benefits by:

- Providing more water for stream flows that fish need to survive.
- Building fish passage to allow salmon, steelhead, and bull trout to travel throughout the basin, and reestablishing what could be the largest sockeye run in the lower 48 after extirpation from the Yakima Basin over a century ago.
- Providing greater water supply reliability for farmers and communities.
- Securing the water that communities need to meet current and future demand.
- Protecting over 200,000 acres of currently unprotected forest, shrub steppe, and river habitat.
- Stretching the amount of water available by using it more efficiently.
- Enhancing habitat along the Yakima River and its tributaries.

Essential elements to the Yakima Basin Integrated Plan are improvements to reservoirs located on Forest Service lands that provide vital water to the Yakima River basin for fish, cities, and agriculture. These reservoirs have been in place and in use for many years and are the lifeblood to the communities and people served by the reservoirs. The Forest Service Directive could delay or derail the implementation of this vital, innovative, and broadly supported plan, including already approved projects which will provide water for fish and habitat.

NWRA members remain dedicated to providing a safe, reliable and affordable water supply in an environmentally responsible manner. We are concerned that the Forest Service Directive will make meeting future water supply needs exponentially more difficult and will not provide any additional environmental benefit.

SUMMARY

NWRA members, both agricultural and municipal water providers, and the farmers and water users they represent, support the goals of the Clean Water Act and are committed to working with the agencies in a collaborative manner that respects states rights. Our members have, and will continue to meet their obligations to provide an efficient and safe water supply and remain dedicated to the protection of our natural resources.

Unfortunately, the CWA proposed rules could impose additional regulatory burdens on water suppliers, farmers, local communities, and economies, with only marginal environmental benefits. Many geologic and man-made water related features common to the arid West, including ditches, dry arroyos, washes, and ephemeral streams that flow only in response to agricultural return flows or infrequent storm events will now become subject to Federal jurisdiction and permitting; negatively impacting the ability of suppliers to timely and efficiently maintain their systems and supply critical water to the water users.

NWRA also has many of the same concerns with the Forest Service Groundwater Management Directives. The Forest Service is attempting to assert authority over groundwater and surface water decisions which are beyond its authority and within the scope of the states' jurisdiction on water rights. The Forest Service needs to pull back on its regulatory overreach.

We thank you for this opportunity to testify. Despite our concerns, NWRA and its members are committed to assisting Congress and the agencies to address these issues in providing certainty to jurisdictional requirements under the Clean Water Act. . On behalf of NWRA's members I thank you for your attention to the critical water supply issues facing our Nation, and for supporting our members as they continue to be stewards of our Nation's water supply and a critical part of the economy.

ATTACHMENT

EASTERN MUNICIPAL WATER DISTRICT

The facilities pictured below offer just a few of the many examples of EMWD water and recycled water facilities that are in jeopardy of becoming waters of the United States under U.S. EPA's proposed rule defining waters of the United States.

Example 1—Sun City Ponds (Near Salt Creek, Perris), Water Reuse Facilities

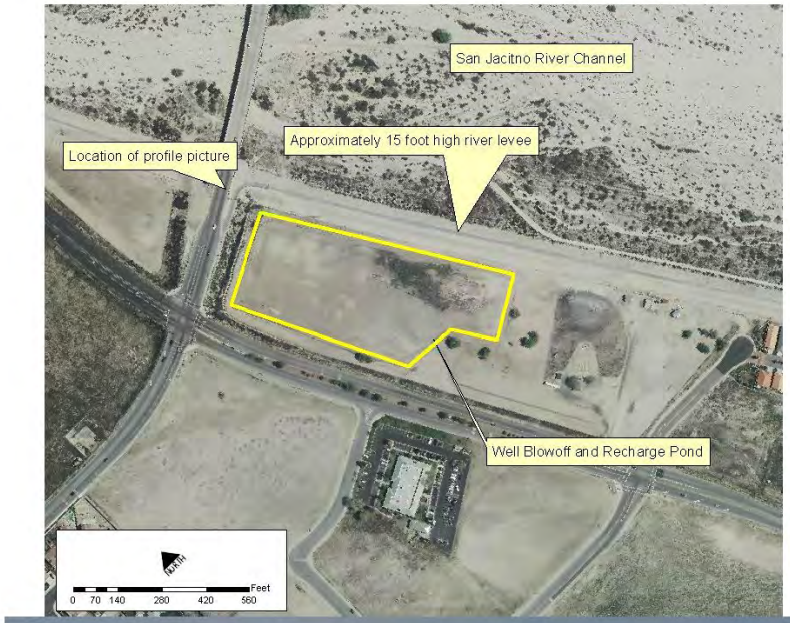
Unlined ponds are adjacent to a creek, and have a subsurface connection to Salt Creek.

Example 2—Alessandro Ponds (Near San Jacinto River), part of Water Reuse Facilities

Recycled water storage ponds that could become jurisdictional based on adjacency, subsurface hydrologic connection, and the location in the flood plain of the San Jacinto River.

Example 3—Well Blowoff and Recharge (Mountain Avenue 2 Recharge Pond, part of future for groundwater banking, recharge site) Wells 33, 80 and 36, potable water system

Unlined pond is adjacent to the San Jacinto River, and has a subsurface connection to the river. This is a closed groundwater basin, there is no subsurface outflow. Groundwater recharge sites are often located adjacent to, but not within riverbeds.



Example 4—Well Blowoff Pond (Lakeview on Nuevo Road), potable water system

This unlined pond is about 2,000 feet from the San Jacinto River and is in the 100-year flood plain. Overflow from this facility is tributary to the San Jacinto River.

Mr. MCCLINTOCK. Thank you, Mr. Martin, for your testimony.

I now recognize Mr. Patrick Tyrrell, State Engineer for the State of Wyoming from Cheyenne, Wyoming to testify.

STATEMENT OF PATRICK TYRRELL, STATE ENGINEER, STATE OF WYOMING, CHEYENNE, WYOMING

Mr. TYRRELL. Chairman McClintock, Ranking Member Napolitano, and members of the subcommittee, my name is Patrick Tyrrell. I am the Wyoming State Engineer. My office is responsible for the issuance and administration of rights to surface and groundwater, both of which lay under the ownership and control of the State of Wyoming.

I appreciate the opportunity to testify regarding the Proposed Directive on Groundwater Resources Management, Forest Service Manual 2560, noticed in the Federal Register on May 6, and on Wyoming's perspective regarding the Clean Water Act jurisdiction rule that the EPA and the Corps of Engineers published in the Federal Register on April 21.

Regarding the Forest Service proposed directive, it is intended to add Federal management responsibilities for groundwater to USFS land. It changes the Forest Service national policy on water management and challenges Wyoming's authority over groundwater within our borders, including Wyoming's primacy in appropriation and administration of that groundwater.

The assumptions, definitions, and new permitting considerations contemplated materially interfere with Wyoming's authority over surface and groundwater. Our concerns are, first, that the Forest Service fails to provide any substantive citation with explicit authority to manage groundwater because there is no such authority under Federal law.

In Section 2567, the proposal appears to assert reserved rights to groundwater. However, there is no authority giving National Forest the benefit of a Federal reserved right to groundwater.

The proposed Directive seeks to give a role for the Forest Service to assert itself uniquely in groundwater permitting decisions on lands not part of, but adjacent to, Forest Service property. Wyoming water law controls the issuance and regulation of all water rights, including those on Forest lands within the state.

The Forest Service also assumes for management purposes that groundwater and surface water are connected unless demonstrated otherwise, an assumption that runs counter to Wyoming's presumption of non-connection, which is superior.

In 2012, the Forest Service in the State of Wyoming entered into a Memorandum of Understanding that runs until 2016. In this MOU the Forest Service agreed to recognize and respect the laws and Constitution of the State of Wyoming and permitting practices that apply equally to the United States and to water right applications by our citizens.

The proposed directive contains several positions foreign to that MOU. By noticing the State of Wyoming along with the general public on the May 6 release, the Forest Service denied the state an important consultative role counter to Executive Order 13132.

The State of Wyoming is more than a simple stakeholder, and we expect true consultation to occur. In short, the Forest Service

should retract the directive and honor the state's authority over the issuance, adjudication and administration of water rights within our boundaries.

Regarding the "Waters of the U.S." jurisdictional rule, the Clean Water Act limits Federal jurisdiction over state waters, recognizing that the states are better situated to make decisions regarding water, including water quality in minor waters that are not of national significance.

By broadening definitions of existing regulatory categories, such as tributaries, and regulating new areas that are not jurisdictional under current regulations, the proposed rule provides no limit to Federal jurisdiction. While EPA and the Corps have added a specific statement in the proposed rule that excludes groundwater, shallow subsurface flows are still to be used to establish jurisdictional nexus.

Clean Water Act regulations cannot be applied to distinct surface waters connected to shallow subsurface waters without risking expansion of jurisdiction over all groundwater.

The proposed rule defines all ditches with a bad bank and high water line as tributaries potentially subject to Federal jurisdiction. This accompanies what was earlier described as roadside irrigation or storm water ditches. While there remains an exemption for ditches that do not contribute flow to waters identified as navigable, there is no bright line rule that excludes ditches under the proposal.

Semi-arid Wyoming had an amazing 3,200 miles of ditches at statehood in 1890, and all are apparently at risk now. Wyoming is concerned that EPA and the Corps are attempting to implement a policy that all connections between waters are significant without regard to how much or how often they actually contain water or influence truly navigable waters.

The proposal expands the Clean Water Act regulatory coverage of tributaries and includes broad new categories such as ditches, adjacent waters, riparian areas, and floodplains, making the changes sweeping in nature. The proposed rule contains a confusing list of exemptions, including the narrow ditch exemption I described. These exemptions apply to a limited set of features applicable wholly on uplands, another critical term which is undefined.

It is imperative that with a rulemaking process which directly affects the state's implementation as co-regulators of Clean Water Act programs that significant input and review be provided to co-regulator entities on the substance of the proposed rule. However, Wyoming and other states were not consulted early in the rulemaking process.

Thank you for the opportunity to testify here today.

[The prepared statement of Mr. Tyrrell follows:]

PREPARED STATEMENT OF PATRICK TYRRELL, P.E., WYOMING STATE ENGINEER, CHEYENNE, WYOMING

Introduction

Chairman McClintock, Ranking Member Napolitano, and members of the subcommittee, my name is Patrick Tyrrell. I am the Wyoming State Engineer. The Wyoming State Engineer's Office is responsible for the administration, regulation,

and adjudication of water rights to surface and groundwater, both of which lay under the ownership and control of the State of Wyoming.

I appreciate the opportunity to first testify today regarding the *Proposed Directive on Groundwater Resources Management, Forest Service Manual 2560*, (hereafter the "Proposed Directive") noticed in the Federal Register on May 6, 2014. Second, I will comment on Wyoming's perspective regarding the Clean Water Act (CWA) jurisdiction rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) proposed on March 25, and published in the Federal Register on April 21.

FOREST SERVICE PROPOSED DIRECTIVE

Background

The United States Forest Service (USFS) asserts that its Proposed Directive is intended to add Federal management responsibilities for groundwater on USFS lands (79 FR 25815, May 6, 2014). It changes the Forest Service's national policy on water management and challenges Wyoming's authority over groundwater within our borders, including Wyoming's primacy in appropriation, allocation and development of groundwater. The USFS states that this Proposed Directive does not harm state rights. This is not accurate. The assumptions, definitions, and new permitting considerations contemplated under the Proposed Directive materially interfere with Wyoming's authority over surface and groundwater, and will negatively impact the state's water users.

Concerns

The Proposed Directive challenges state prerogatives.

1. *Authority for the Proposed Directive on groundwater management does not exist*. The USFS fails to cite any Federal statute or court ruling which provides for or describes its authority to manage groundwater because there is no such authority under Federal law. In section 2567, the Proposed Directive appears to assert reserved rights to groundwater. However, there is no authority giving National Forests the benefit of a Federal reserved right to groundwater.
2. *The Proposed Directive seeks to give a role in paragraph 6f for the USFS to insert itself in groundwater permitting away from USFS property*. This is an extra-territorial reach beyond USFS authority, and conflicts with Wyoming water law which establishes the Wyoming State Engineer as the exclusive permitting agency. It also places a burden on water users who might have their water source proposal thwarted by USFS action. Under Wyoming law, the burden would lie with the USFS to prove a hydraulic connection sufficient to warrant conjunctive administration, not on individual appropriators as presumed by the Proposed Directive. In many cases, groundwater is not meaningfully connected to surface water, and Wyoming's presumption of non-connection is superior. This is not to concede that there is even a legal basis for a debate on this subject, since Wyoming water law controls the permitting, adjudication, and regulation of water rights on USFS lands within the state. It is entirely inappropriate for the USFS to attempt to extend its administrative reach onto lands they do not manage.
3. *Conflict with recent MOU*. In January 2012, the USFS and the State of Wyoming entered into a Memorandum of Understanding (MOU) that runs through 2016. In this MOU, the USFS agreed to recognize and respect the laws and Constitution of the State of Wyoming and to honor permitting practices that apply equally to the United States and to water right applications by Wyoming citizens. The Proposed Directive, creating a Federal reach into an area where states have been recognized as the exclusive entity for water right permitting, is contrary to the recent MOU. (A copy of the MOU has been retained in the Committee's official files)
4. *The Proposed Directive puts a burden on Wyoming water users*. From the proposed required measurement and reporting of produced groundwater (paragraph 8), to the possible hydrogeologic studies needed to show that an aquifer is not connected to surface waters (paragraph 2), Wyoming appropriators will be faced with a new slate of obligations and costs for water use on these public lands.
5. *The Proposed Directive was created without state consultation*. By noticing the State of Wyoming along with the general public in the May 6 release, the USFS denied the state an important consultative role. As the primary water manager in an appropriative state like Wyoming, the State Engineer's Office

is more than a simple stakeholder—we follow a system of water laws under which the Federal agencies are water users like anyone else. Treating the state as a simple commenter on Federal directives ignores the state's primary authority as recognized by Congress dating from the 1800s including the McCarran Amendment (relied upon by the states since 1952), and the U.S. Supreme Court. Importantly, the notice indicates that USFS has consulted with Indian Tribal Governments in preparation of this document under E.O. 13175, but for some reason has decided not to enter consultation with the states under E.O. 13132. This action wrongfully diminishes Wyoming's role.

Time prohibits me from additional comment at this hearing, but I anticipate that Wyoming will prepare additional and thorough comments by the comment deadline established by the USFS. The best action the USFS could take would be to retract the current notice and comment period and thereby honor the law that give the states authority over the adjudication, administration and regulation of water rights within their boundaries.

WATERS OF THE U.S. (WOTUS) JURISDICTIONAL RULE

Background

The Clean Water Act limits the Federal jurisdiction over state waters recognizing that the states are better situated to make decisions regarding water, including water quality in minor waters that are not of national significance. The Wyoming Department of Environmental Quality, Water Quality Division is the agency responsible for establishing water quality standards and TMDLs, administering the NPDES discharge permitting program and providing section 401 water quality certifications for federally permitted projects on waters in Wyoming. The proposed rule attempts to erode Wyoming's primary authority over low flow, remote, headwater stream channels and isolated ponds and wetlands by expanding the concept of national significance.

Concerns

1. *The proposed WOTUS rule expands Federal jurisdiction beyond Federal authority*. By broadening definitions of existing regulatory categories, such as "tributaries," and regulating new areas that are not jurisdictional under current regulations, the proposed rule provides no limit to Federal jurisdiction. Water in a riparian area or a floodplain, a connection through shallow subsurface water or directly or indirectly through other waters, and aggregation of similarly situated waters, are waters that may not be within Federal jurisdiction but are waters that the proposed rule attempts to capture.
    a. *The proposed rule's extension of jurisdiction to remote and insubstantial waters runs afoul of both the plurality and Justice Kennedy's standards in Rapanos*. The plurality in *Rapanos* declined to find jurisdiction beyond "relatively permanent, standing or continuously flowing bodies of water," specifically excluding "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Rapanos* v. *United States*, 547 U.S. 715, 739–42 (2006). Likewise Justice Kennedy refused to find jurisdiction over "remote and insubstantial" waters that "may flow into traditional navigable waters." *Id*. at 778.
    b. *Asserted Jurisdiction over groundwater*. The proposed rule does not ensure that Wyoming's groundwater is off limits. While EPA and the Corps have added a specific statement in the proposed rule that excludes groundwater, they continue to assert that shallow subsurface flows could be used to establish jurisdictional nexus. In Wyoming, surface and groundwater quantity are regulated separately unless they are determined to be a single source of supply. That determination is exclusively within the purview of the Wyoming State Engineer. As a practical matter, CWA regulations cannot be applied to distinct surface waters connected only through subsurface waters without expanding jurisdiction over all groundwater in contravention of the Wyoming Constitution and without any authority to do so.
    c. *Clean Water Act success depends upon state and local implementation*. Expansion of EPA and Corps jurisdiction over any waters not previously considered as WOTUS is not justified by science, fact or law. The states are in the best position to protect and manage these waters.
2. *Problem elements of the proposed rule*.

a. *Jurisdiction over ditches*. The proposed rule defines all ditches with a bed, bank and high water line as tributaries potentially subject to Federal jurisdiction. This encompasses roadside, irrigation, and storm water ditches. There remains an exemption for ditches that do not contribute flow, either directly or indirectly, to water identified as navigable, interstate waters, territorial seas, and impoundments. However, the "waters are muddied" which places citizens, governments, and other entities in a position that they can no longer rely on the workable bright line rule categorically excluding ditches. This will disrupt agricultural, governmental and emergency operations.

b. *The rule does not clarify which waters fall under CWA jurisdiction* (unless we are to assume that nearly all waters fall under such jurisdiction) and in fact, creates confusion and potential conflict with the Supreme Court's interpretation. Given the expedited review timeline and the glaring lack of state involvement, Wyoming is concerned that EPA and the Corps are attempting to implement a policy decision that all connections between waters are "significant" without regard to how much or how often they actually contain water or influence truly navigable waters.

The proposed rule establishes newly created, far-reaching consequences and key concepts are undefined and subject to agency discretion. The rule fosters subjectivity—a result diametrically opposed to principles of regulation, leaving us to question the authoring agencies' intent. The proposal expands the CWA's regulatory coverage of tributaries and includes broad new categories of waters, such as ditches, adjacent waters, riparian areas and floodplains, making the changes sweeping in nature and negative in consequence.

c. *Vague exemptions*. The proposed rule contains confusing list of exemptions, including the narrow ditch exemption. These exemptions apply to a limited set of features applicable wholly on uplands (another critical term left undefined in the proposed rule). It is noteworthy that in the rule's preamble, EPA and the Corps acknowledge the difficulty of distinguishing excluded "gullies and rills" from potentially regulated "ephemeral streams."

3. *Flaws with the Science Advisory Board Report*

a. The Science Advisory Board Report is void of information from actual Corp Section 404 and 401 determinations or state environmental quality offices. If the draft Report had included this information, it is difficult to conceive that a neutral reviewer would have supported the proposed CWA rulemaking and the conclusions outlined in the Connectivity Report.

b. The Science Advisory Board lacked any state representative, even though states like Wyoming specifically requested to have a member of its regulating agency appointed. Conversely, environmental interests were represented on the Board. The states' role would be better protected by state representation on the Board, and more effective CWA policies and regulations would result.

c. The Connectivity Report fails to adequately address ephemeral drainages and their impact to downstream waters of the United States. Ephemeral water bodies may be streams, wetlands, springs, streams, ponds or lakes that only exist for a short period of time following precipitation or snowmelt. Under this rule, ephemeral streams might now be considered tributaries to navigable streams if they exhibit a bed, banks and a high water mark. Jurisdictional determination of these waters would require application of principals announced in *Rapanos*, which cannot be met through sweeping statements which attempt to alter the definition and are unrelated to actual characteristics of the water body.

d. The EPA and the Corps expedited submittal of the draft Connectivity Report to the EPA Science Advisory Board and, at the same time, they submitted the proposed rule to OMB. This action cuts off scientific deliberation vital to the fundamental questions underlying this proposed rule.

4. *The proposed WOTUS rule was also created without state consultation*. Like other states, the State of Wyoming plays a significant role in ensuring effective implementation of the Clean Water Act. Our co-regulator status elevates the State of Wyoming, and every other state, above the multitude of other stakeholders now engaged in the public review process. It is imperative that with a rulemaking process of this magnitude, which directly impacts the

states' implementation of CWA programs, that significant input and review be provided to co-regulator entities on the substance of the proposed rule. However, Wyoming and other states were not included in the WOTUS rulemaking process.

As state co-regulators, we bring a unique perspective on the western environmental issues that we handle day to day. Failing to consult with Wyoming and other states not only violates executive and congressional mandates, but also erodes the very trust and cooperation upon which we co-regulators depend. The process employed here adds insult to the injury inflicted by an illegal and unwise rule.

The Wyoming State Engineer administers water quantity. Questions related specifically to water quality may be best answered by the Wyoming Department of Environmental Quality. If questions arise that I cannot answer, I will provide written answers to the subcommittee after consulting with the appropriate expert.

Thank you for the opportunity to testify here today.

Mr. MCCLINTOCK. Thank you, Mr. Tyrrell.

I now recognize Mr. Andrew Lemley, a Government Affairs Representative for New Belgium Brewing Company based in Fort Collins, Colorado, to testify.

STATEMENT OF ANDREW LEMLEY, GOVERNMENT AFFAIRS REPRESENTATIVE, NEW BELGIUM BREWING COMPANY, FORT COLLINS, COLORADO

Mr. LEMLEY. Thank you, Chairman McClintock, Ranking Member Napolitano, and committee members, for your time this morning.

My name is Andrew Lemley, and it is an honor and a privilege to be here this morning representing my 550 co-workers and fellow employee owners at New Belgium Brewing Company.

The main message I have here today is that we depend on clean water for our success. Beer is, after all, at least 90 percent water, and that is why, frankly, we are pleased that the Environmental Protection Agency issued these new draft rules, to clarify protections for water bodies under the Clean Water Act. This action by the EPA gives us the confidence that our growing brewery needs. We will continue to grow if we can count on clean water, which is essential to brewing our beers and being a prosperous business.

Our journey in crafting world class beers and running a successful business show just that. Over the past 23 years, we have learned that when smart regulation exists for all and when clean water is available for all, that business thrives. We have grown from the basement of our co-founder's home to a 900,000 barrel brewery in Fort Collins, Colorado, and right now as we sit here, we are building another 500,000 barrel brewery in Asheville, North Carolina.

We have been able to grow from 2 to 550 co-workers because of the protection that the EPA and Army Corps of Engineers guarantee for our water supply. Clarity in regulation and the protection of natural resources are keys to economic development.

We believe that the administration's Clean Water Rule would restore clear national protections against unregulated pollution and destruction for nearly two million miles of streams and tens of millions of acres of wetlands in the continental United States.

The cost-benefit analysis done for the Clean Water Rule by the EPA estimates that it would generate between $388 million and $514 million in economic benefit, exceeding the expected costs. That is one of the reasons that the American Sustainable Business Council, of which we are business partners, supports it.

Clean water is part of our own triple bottom line business model. We focus on making a profit, caring for the planet, and doing what is right for people, and our journey has led us to take innovative steps to reduce our impact on the water supply. We have built an onsite wastewater treatment plant. We have cut water use, and we give dollars directly to nonprofit organizations engaged in water conservation and restoration.

We do what we can to honor the environment in our own process. We advocate for sound policies, and we give dollars directly to organizations doing work to clean up our rivers, lakes and streams. Making world class beer, being profitable, and honoring the environment, for us, go hand in hand.

The craft beer industry in the United States is thriving. In Colorado alone, we have over 240 licensed brewers that employ over 5,000 people. Nationwide the numbers are over 27,000 craft brewers that employ over 110,000 people, and we rely on clean, plentiful water supplies to craft great beers and employ tens of thousands of Americans, and these jobs are jobs that cannot be outsourced. They range from technicians on bottling lines to brewers, to microbiologists, to chemists, to human resources professionals, to sales and marketing professionals, and everything in between. These are good jobs to growing companies, and we rely on responsible regulations that limit pollution and protect water at its source.

In addition to water as a beer ingredient, we also rely on clean water nationwide to be available for barley, hops—thank you, Yakima Valley—and other agricultural products that we use.

I am certain that some will see a downside, we have heard some of that already this morning, to these protections and worry about higher costs, but we just think that is a misguided view. Under these new safeguards, we believe that hundreds of communities will now enjoy the full protections of our Nation's clean water laws.

According to EPA's analysis, in Colorado alone, more than 3.7 million Coloradans get drinking water from systems drawing in whole or in part from intermittent ephemeral or headwater streams. We believe that we have the opportunity and responsibility for thriving businesses like New Belgium to do everything in our power to protect the water that we need to grow our company and expand local economies in which we work.

I thank you again for the opportunity to be here and testify in front of you.

[The prepared statement of Mr. Lemley follows:]

PREPARED STATEMENT OF ANDREW LEMLEY, GOVERNMENT AFFAIRS REPRESENTATIVE, NEW BELGIUM BREWING COMPANY, FORT COLLINS, COLORADO

Mr. Chairman, committee members, thank you for your time this morning. My name is Andrew Lemley, and it is an honor and a privilege to be here today representing my 550 co-workers and fellow employee owners of New Belgium Brewing Company in Fort Collins, Colorado.

We depend on clean water for our success. Beer, after all, is 90 percent water. That's why we're pleased that the Environmental Protection Agency (EPA) issued new draft rules to clarify protections for water bodies under the Clean Water Act. This action by the EPA gives us the confidence that our growing brewery needs. We will continue to grow if we can count on clean water which is essential to brewing our beers and being a prosperous business.

It makes sense to protect tributary streams and nearby waters—the science shows, without doubt, that they are linked to downstream water quality. And other waters should be protected when they have similar impacts downstream. Not polluting those resources, and minimizing your impact when you do, is just being a good neighbor—something that we at New Belgium Brewing strive to do in our operations.

Our journey in crafting world class beers and running a successful business show that. Over the past 23 years we've learned that when smart regulation exists for all—and when clean water is available for all business thrives. We've grown from the basement of our co-founders' house in Fort Collins to our 900,000 barrel per year brewery in Fort Collins, Colorado. We're also building a new 500,000 barrel brewery in Asheville, North Carolina. We have been able to grow from 2 to 550 coworkers because of the protection that the EPA and Army Corps of Engineers guarantee for our water supply.

Clarity in regulation and the protection of natural resources are keys to economic development.

The administration's Clean Water Rule would restore clear national protections against unregulated pollution and destruction for nearly two million miles of streams and tens of millions of acres of wetlands in the continental United States. These water bodies prevent flooding, filter pollution, supply drinking water to millions of Americans, and provide critical fish and wildlife habitat. What's more, they provide these valuable services for free. In fact, the cost-benefit analysis done for the Clean Water Rule estimates that it would generate between $388 million and $514 million per year in economic benefits, far exceeding expected costs ($162 to $278 million annually). That's one of the reasons the American Sustainable Business Council so strongly supports it.

Clean water is a part of our own triple bottom line business model. We focus on making profit, caring for the planet and doing what is right for people. Our journey has led us to take innovative steps to reduce our own impact on the water supply. We've built an onsite process wastewater treatment plant. We've cut water use. We give philanthropic dollars to nonprofits engaged in water conservation. In 2013 we gave grants to 22 groups engaged in water conservation and restoration activities. We do what we can to honor the environment in our own process. We advocate for sound policies. We give dollars directly to nonprofit organizations doing the work to clean up our rivers, lakes and streams.

Making world class beer, being profitable and honoring the environment for us go hand in hand. Our beer lovers appreciate and respect our work with philanthropy and advocacy for clean water. They know that our efforts result in making great beer, protecting drinking water and having great recreational waters. They appreciate that we take steps to make sure our business, our country and our planet are on a course that can be sustained for future generations.

And it's not just us. The craft beer industry in the United States is thriving. In Colorado alone we have over 242 licensed breweries employing over 5,000 people. Nationwide there are 2,722 craft breweries employing 110,000 people. We rely on clean, plentiful water supplies to craft great beers and employ tens of thousands of Americans. These jobs cannot be outsourced and they range from production technicians to brewers to microbiologists and chemists to sales and marketing, human resources (or co-workers and culture as we call it) and everything in between. These are good jobs at growing companies. We rely on responsible regulations that limit pollution and protect water at its source for our growth.

In addition to water as a beer ingredient we also rely on clean water nationwide to be available for barley, hops and other agricultural products that we use.

I'm certain that some will see a downside to these protections and worry about higher costs. This is a short sighted view and misguided. I mentioned that we are building a new brewery in Asheville, North Carolina. One of the reasons that we chose Asheville is its abundant and clean water supply. And just this spring a coal ash pond broke through its banks and is causing a massive cleanup effort that will cost millions. No one benefits from occurrences like these. The company responsible for cleanup pays, and my co-workers and I worry about the next human caused disaster that will threaten our livelihood.

Under the new safeguards proposed by the Obama administration, hundreds of communities will now enjoy the full protections of our Nation's clean water laws.

Bringing these streams and wetlands under the umbrella of the Clean Water Act will also help protect drinking water for 117 million people. It will safeguard natural flood protection, since wetlands and streams help catch and soak up rain. This is no small benefit; 9.6 million homes and $360 billion dollars-worth of properties lie in flood-prone areas. We witnessed firsthand in the last 2 years how wildfires and floods can affect the water supply. We do not need the added anxiety of human introduced pollutants in wetlands, headwaters and streams.

According to the EPA's analysis, more than 3.7 million Coloradans get drinking water from systems drawing in whole or part from intermittent, ephemeral or headwater streams. http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf.

We have the opportunity and the responsibility for thriving businesses like New Belgium to do everything in our power to protect the water that we need to grow our company and expand the local economies in which we work. We are in the midst of a public comment process on this rule—comments are being accepted until October. While there have been numerous attempts to stop this process, we think this is a mistake—it would effectively cut off the open opportunity for people who care about their water to ask the agencies to protect these resources and determine the best way to do so.

Thank you again for this opportunity.

Mr. MCCLINTOCK. Thank you, Mr. Lemley.

I now recognize Mr. Randy Parker, Chief Executive Officer of the Utah Farm Bureau Federation from Sandy, Utah to testify.

STATEMENT OF RANDY PARKER, CHIEF EXECUTIVE OFFICER, UTAH FARM BUREAU FEDERATION, SANDY, UTAH

Mr. PARKER. Mr. Chairman, Ranking Member and committee members, my name is Randy Parker. I am CEO of the Utah Farm Bureau Federation. I am here today representing more than 28,000 member families in Utah and more than six million member families across the country. It is an honor to be here with you today.

Farm Bureau members are greatly concerned with the expansion of government regulations, including challenges to sovereign state water rights and historic livestock grazing on public lands. Federal agencies are hurting hard working farm and ranch families who pay taxes and contribute to their local economies.

As a country we are at a crossroads. Today we see more aggressive control of our natural resources through growing government rules and regulations, while the Federal agencies ignore congressional limits in place to protect the historic Federal-state framework. Federal agencies are testing the boundaries of their regulatory authority as witnessed by EPA's expansion of the Clean Water Act and "Waters of the United States" as well as global warming regulations.

Now, the Forest Service has served notice that they, too, want greater command and control, challenging the sovereign rights of the states as established by Congress. To be clear, the waters originating within the boundaries of the State of Utah, including on the lands managed by the Forest Service, are not the waters of the Federal Government, nor are they the waters of the American people. They are the sovereign waters of the State of Utah and belong to the citizens of Utah.

Grazing livestock on lands held in common has been a part of Utah's landscape since our pioneer settlement. These lands serve the common good of the people just as the 1960 Multiple Use Sustained Yield Act requires that the public lands meet and serve

human needs. The regulatory culture of the Forest Service has dramatically increased the level of uncertainty. According to Nevada Federal Judge Robert Jones, the history of the Forest Service is about seeking reductions in AUMs and even elimination of cattle grazing.

For Utah, that is a stark reality. According to Utah State University, in 1940 the Forest Service administered 2.7 million sheep and cattle AUMs in Utah. In 2012 that number was 614,000, or a whopping 78 percent reduction in grazing AUMs.

The State of Utah ranchers and sportsmen have invested tens of millions of dollars into habitat restoration on public lands to increase livestock and wildlife feed. Although there is more feed to eat, the Federal land management agencies continue to cut or suspend grazing permits. The Forest Service Directive is another challenge to state authority. The Forest Service has a long history of actions seeking to soak up more state water rights, including 16,000 diligence claims in Utah, ownership of ski area water rights, joint ownership of livestock water rights, fencing cattle off of their water, and cutting livestock grazing AUMs that gives the Federal Government de facto water rights.

The Agency argues the directive is not regulatory. However, the Forest Service directive system requires its employees to implement the manual, and failure to do so has consequences.

With 70 percent of Utah's waters originating on Forest lands, connectivity creates a major shift of jurisdictional bounds. The Utah State Engineer is concerned for the uncertainty created with state sanctioned existing water rights. The Utah Constitution protects private property against government taking or diminishment of value, and that includes water.

The Forest Service is seeking Federal supremacy over state water rights by imposing permitting written authorization and reporting. This costly and time consuming process overlaid on state regulatory functions will cause confusion and is detrimental to the economic future of states that rely on water flowing from the Forest system lands. The agency's ongoing obsession with obtaining water rights and massive watershed management sets up a major Federal-state conflict. The Forest Service is carrying out this broad objective at taxpayer expense in direct competition for waters originating on the system lands with communities, farmers and ranchers and future economic growth.

The USDA says the directive is not significant at $100 million a year. That analysis is shocking. Water is the economic lifeblood of the West. Regulatory actions against grazing cattle or reducing water flows to California, Arizona farms and ranches will cost much more than USDA estimates. It is the right and obligation of the Congress to set boundaries for Federal agencies. Please reign in USDA, Forest Service and EPA in this job-killing overreach.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Parker follows:]

PREPARED STATEMENT OF RANDY N. PARKER, CHIEF EXECUTIVE OFFICER, UTAH FARM BUREAU FEDERATION, SANDY, UTAH

The Utah Farm Bureau Federation is the largest general farm and ranch organization in the state of Utah representing more than 28,000 member families. We represent a significant number of livestock producers who use the Federal lands for

sheep and cattle grazing. Livestock ranching is an important part of the historic, cultural and economic fabric of the state of Utah and is a major contributor to the state's economy. In the second most arid state in the Nation, water was and continues to be of critical importance.

Utah's food and agriculture sector contributes to the state's economic health and well-being generating billions of dollars in economic activity and providing jobs to tens of thousands of Utah citizens. Utah farm gate sales in 2013 exceeded $1.7 billion and according to Utah State University the economic ripple effect is dramatic. Forward and backward linkages to industries like transportation, processing, packaging and determined food and agriculture are the catalyst for $17.5 billion in economic activity, or about 14 percent of the state GDP providing nearly 80,000 jobs.

As water has historically been developed in the west, it was for the production of food and fiber. According to the Utah State Engineer, farmers, ranchers and agriculture interests own and control 82 percent of Utah's developed water. The landscape of the west is changing with growing populations and increased demand for limited water resources. With nearly 70 percent of Utah owned and controlled by the Federal Government, sovereignty and state control of our water resources is critical to food security, growth and future prosperity.

Utah Farm Bureau delegates in November 2013 adopted policy that calls on the Federal Government to "not claim ownership of water developed on Federal land." In addition, Farm Bureau policy calls for "state control of water rights, stock water rights to be held by the individual grazing permittee and protection against Federal encroachment on state waters."

HISTORY

Scarcity of water in the Great Basin and southwest United States led to the development of a system of water allocation that is very different from how water is allocated in regions graced with abundant moisture. Rights to water are based on actual use of the water and continued use for beneficial purposes as determined by state laws. Water rights across the west are treated similar to property rights, even though the water is the property of the citizens of the states. Water rights can be and often are used as collateral on mortgages as well as improvements to land and infrastructure.

The idea of a "riparian" interest in water that appears to be factored into the Forest Service Groundwater Resources Management Directive is not a legally recognized concept by most western states, holders of western water rights and under western water law.

The arid west was transformed by our pioneer forefathers through the judicious use of the precious water resources. Utah is the Nation's second most arid state, second only to Nevada. For our ancestors, protecting and maximizing the use of the water resources was not only important, it was a matter of life and death. Water retains that same level of importance today!

CONGRESSIONAL ACTIONS

"ESTABLISHING SOVEREIGN WATER RIGHTS OF THE STATES"

The settlers in the arid west developed their own customs, laws and judicial determinations to deal with mining, agriculture, domestic and other competing uses recognizing first in time, first in right. Out of these grew a fairly uniform body of laws and rights across the western states. The Federal Government as original sovereign and owner of the land and water prior to Congress granting statehood ultimately chose to acquiesce to the territories and later the states on control, management and allocation of water.

Act of July 26, 1866:

The U.S. Congress passed the Act of July 26, 1866 [subsequently the Ditch Act of 1866] that became the foundation for what today is referred to "Western Water Law." The Act recognized the common-law practices that were already in place as settlers made their way to the western territories including Utah. Congress declared:

> "*Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected.*" (43 U.S.C. Section 661)

This Act of Congress obligated the Federal Government to recognize the rights of the individual possessors of water, but as important, recognized "local customs, laws and decisions of state courts."

The Desert Land Act of 1877:

> "*All surplus water over and above such actual appropriation and use . . . shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing . . .*"

The Taylor Grazing Act of 1934:

> "*nothing in this Act shall be construed or administered in a way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing and other purposes . . .*"

The McCarran Amendment of 1952:

Congress established a unified method to allocate the use of water between Federal and non-Federal users in the McCarran Amendment. (43 U.S.C. Section 666) The McCarran Amendment waives the sovereign immunity of the United States for adjudications for all rights to use water.

> "waives the sovereign immunity of the United States for adjudications for all rights to use water."

The 1976 Federal Land Policy Management Act:

> "All actions by the Secretary concerned under this act shall be subject to *valid existing rights*."

Congress has been explicit in the limits it has established on sovereignty and state's rights for the U.S. Forest Service and other land management agencies.

OBAMA ADMINISTRATION

"INCREASING COMMAND & CONTROL"

In the public lands states of the American West, there has been a growing distrust of the Federal land management agencies as they have imposed greater command and control over the natural resources of the region. The uncertainty of changing attitudes within the agencies often driven by the politics of the day creates economic challenges for farmers, ranchers, businesses, communities and the western states.

For grazing of livestock that began as the first pioneers entered the Salt Lake Valley in 1847, the lands held in common were utilized in the best interests of the common good. The Multiple Use—Sustained Yield Act of 1960 held to the same important values—Meet and Serve Human Needs!

The production of meat protein from the lands held in common (public lands) provides a value to all Americans, even those who are physically or financially unable to travel to the west. Agency actions have dramatically reduced generation's old livestock grazing rights (Animal Unit Months—AUMs) with water often cited as the reason. In the trespass case *United States* v. *the Estate of Wayne Hage*, grazing rights, livestock water rights and access to the state's sovereign waters on Federal lands came to a boiling point in a Nevada Federal Courtroom in 2012. Nevada Federal District Court Chief Judge Robert C. Jones in a striking and revealing statement said:

> "*Anybody of school age or older knows the history of the Forest Service in seeking reductions in AUMs and even the elimination of cattle grazing during the last four decades*."

The pervasive culture and attitude of the leaders and employees of the U.S. Forest Service has become even more confrontational during the Obama administration. They are seeking to exercise greater control over the System lands that includes reductions in grazing rights, controlling water and challenging access. These detrimental actions are seemingly without regard for the history, culture and economics as required by Federal laws including the Federal Land Policy Management Act.

Some of the aggressive agency actions that imperil property rights, state sovereignty, economic opportunities and jobs are listed below. They are representative of a growing list of regulatory and legal actions that challenge opportunity and hinder economic growth.

UNITED STATES FOREST SERVICE

"WATER—A TROUBLED HISTORY"

It is important to recognize and remember as one analyzes and deliberates over the proposed U.S. Forest Service proposed Groundwater Resources Management Directive—these waters originating on System lands are the sovereign water rights of the people of the State of Utah and do not belong to the Federal Government nor the American people!

Utah Diligence Claims:

The aggressive posture of the Forest Service in collecting western water rights is highlighted in its filing of 16,000 diligence claims on livestock water rights scattered across the Utah landscape belonging to Utah sheep and cattle ranchers. This decades old strategy was defended by now retired Regional Forester Harv Forsgren who argued "these diligence claims are made on behalf of the United States, which was the owner of the land where livestock grazed prior to statehood and livestock watering took place which action established the Federal Government's claim to water rights."

A "Diligence Right" or "Diligence Claim" under Utah law is a claim to use the surface water where the use was initiated prior to 1903. In 1903, statutory administrative procedures were first enacted in Utah to appropriate water. Prior to 1903, the method for obtaining the right to use water was simply to put the water to beneficial use. To memorialize a diligence claim, the claimant has the burden of proof of the validity of beneficial use prior to 1903. The agency's argument continues to be that the livestock beneficially use the water in the name of the United States prior to Utah's statehood. These claims will ultimately require a determination to be made by the State Engineer under the guidance of the Utah Legislature.

Tooele County Utah Grazing Association:

In the spring of 2012, livestock grazing permittees meeting with the local Forest managers were confronted by Forest land managers seeking a "sub-basin claim" from the State of Utah. Where a sub-basin claim is granted by the Utah Division of Water Rights, changes in use and diversion can be done without state approval. The permittees were asked to sign a "change of use" application which would have allowed the agency greater ease in determining what the use would be, including changing use from livestock water to wildlife, recreation or elsewhere.

When permittees objected, they were told that not complying with the Forest Service request could adversely affect their "turn out"—the release of their sheep and cattle onto their Forest allotments.

2004 Forest Service "Water Clause":

In 2008 Utah passed the Livestock Water Rights Act to define the water rights of permittees on the Federal lands based on the ability to place the state's water to beneficial use. The Legislature said:

> "*the beneficial user of a livestock watering right is defined as the grazing permit holder for the allotment to which the livestock watering right is appurtenant*."

The Forest Service filed an ownership claim on all livestock water rights on Forest System lands in Utah claiming they are "the person who owns the grazing permit."

Using the "water clause" as leverage, the Forest Service pushed the Utah Legislature to amend the Act to include "joint ownership" in livestock water rights. The agency argued it was necessary to assure continued water for livestock grazing of Forest lands. Utah did amend the statute to as requested providing for a "Certificate of Joint Ownership." This action and creation of a certificate however did not convey a right of ownership to the Forest Service because rights are based on the ability to beneficially use the state's water.

It is important to recognize Utah law provides greater assurance of water remaining on the livestock grazing allotment than any Federal agency assurances, including internal policies like the Water Clause or the proposed Groundwater Resources Management Directive. Utah law states:

> "*A livestock water right is appurtenant to the allotment on which the livestock is watered*."

In 2014 the Utah Legislature deleted reference to the "Certificate of Joint Ownership" based on concerns in the Forest Service Water Clause and a claim of sole possession. The Clause says:

"In the event of revocation of this permit, the United States shall succeed to the sole ownership of such joint water rights."

It is troubling and offensive to consider that through an adverse agency action on a permitted activity on System lands, the agency "claims" sole possession of previous jointly held private water rights.

It is a government taking without just compensation!

Over-Filing on Historic Water Rights:

In *Joyce Livestock Company* v. *United States*, the Owyhee County based cattle operation had ownership dating back to 1898 including in-stream stock water rights. The United States over-filed on the Joyce water rights based on a priority date of June 24, 1934—the date of passage of the Taylor Grazing Act. The United States could not show that Joyce or any of its predecessors were acting as it agents when they acquired or claimed to have acquired the water rights. In 2007, after nearly a decade of legal actions and hundreds of thousands of dollars in legal costs, the Idaho Supreme Court denied the United States claim and defined the standard of beneficial use. The Idaho Supreme Court said:

"*The District Court held that such conduct did not constitute application of the water to beneficial use under the constitutional method of appropriation, and denied the claimed rights. The Idaho Supreme Court concurred holding that* ***because the United States did not actually apply the water to a beneficial use*** *the District Court did not err in denying its claimed water rights*."

In 1991 in *Hage* v. *United States*, the Forest Service and BLM over-filed on the livestock rights established in 1865 that ultimately became a landmark "Constitutional Takings" case that went before the U.S. Court of Federal Claims. The USCFC award of $4.4 million was appealed to the Federal Court of Appeals for Washington, DC where the award was overturned in 2012. While awaiting a decision, the U.S. Forest Service and BLM in 2007 filed suit in Nevada Federal District Court against the estate of Wayne Hage alleging trespass on Federal lands. In what could only be called a contentious proceeding, Nevada Federal Judge Robert C. Jones heard testimony from Humbolt-Toiabe Forest Ranger Steve Williams stating that:

"*despite the right (of the Hages) to use the water, there was no right to access it, so someone with water rights but no permit from the U.S. Forest Service would have to* ***lower a cow out of the air to use the water***, *for example, if there were no (agency granted) permit to access it*."

June 6, 2012 Judge Jones made two very important observations on the Forest Service and livestock grazing policies:

". . . *the Forest Service is seeking reductions in AUMs and even the elimination of cattle grazing . . .*"

"*I find specifically that beginning in the late '70s and '80s, first, the Forest Service entered into a conspiracy to intentionally deprive the defendants here of their grazing rights, permit rights, preference rights*."

Both the Appeals Court and the Nevada District Court were in agreement that there is "**a right of access**" to put livestock water to beneficial use on Federal lands. Judge Jones ruling even included an access corridor with grazing rights while beneficially using the state's waters.

In the **Tombstone, Arizona** scenario, the Forest Service overreach begins with the agency overfiling on the city's 25 developed springs and wells located in the Huachuca Mountains. For more than 130 years Tombstone piped its privately held water rights some 30 miles for use. Even after the Huachuca's were designated a Federal wilderness area in 1984, Tombstone was allowed to maintain its road and critical access to its springs providing Tombstone with water for culinary needs and maybe more important in this hot, arid place—fire protection and public safety.

Tombstone won the water ownership challenge, but found the agency combative and stonewalling following torrential rains in 2011. After notifying the Forest Service of their need to repair damage as in the past, they were denied access. They sought relief based on the state's public health, safety and welfare obligations. When the city received authorization to do badly needed repairs they were forbidden from using the previously approved mechanized equipment. As city employees showed up with hand-tools and wheelbarrows—armed Forest agents would not allow the "mechanized" wheelbarrows onto the Forest administered lands! As of April 24, the Forest Service has allowed Tombstone access to only 3 of their 25 springs.

Fencing Cattle From Their Water:

In drought stricken Otero County, New Mexico, the Forest Service is blocking rancher's cattle from accessing long held water and recognized as private property rights under state law. The agency told the ranchers with thirsty cattle that they merely replaced old barbed wire fences with new, much stronger metal based fences to establish enclosures to protect a "vital wetland habitat."

Otero County Commissioners issued a "cease and desist" order in an attempt to allow the cattle access to the rancher's water and to protect the state's sovereign water rights. The elected county commissioners charged the Forest agents with an illegal action that could ultimately lead to animal cruelty. The county is threatening the arrest of Federal personnel who are keeping the ranchers from their privately held water rights.

Intermountain Regional Water Policy:

National and Intermountain Region Forest Service policies authorize and instruct agency personnel on the "establishment of water rights in the name of the United States" and provide guidance with "State Specific Considerations" outlining the steps to obtain livestock water rights. In an August 15, 2008 Briefing Paper, Regional Forester Harv Forsgren explained the "United States, through the Forest Service, has filed thousands of claims for livestock water on Federal lands. The Forest Service in the Intermountain Region has filed on or holds in excess of 38,000 stock water rights . . ."

The briefing paper continues, "In recent years, ranchers and community leaders have contested ownership of livestock water rights. Some ranchers believe that they should hold the water rights because their livestock actually use the water. Land management agencies, such as the U.S. Forest Service, have argued that water sources used to water livestock on Federal Lands are integral to the land where the livestock grazing occurs, therefore the United States should hold the water rights." When addressing water development on Forest System lands, the Regional Forester said:

> "The Intermountain Region will not invest in livestock water improvements, nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water right is held SOLELY by the livestock owner."

Restricting the use of private water rights through greater agency control challenges state sovereignty and private property protections under Utah's Constitution.

Defacto Water Rights:

Shrinking livestock grazing rights in Utah have been troublesome for elected officials and livestock ranchers for generations. Following the enactment of the Taylor Grazing Act of 1934 and establishment of Grazing Districts where "chiefly valuable for grazing" was the congressional mandate the Forest Service and BLM authorized more than 5.5 million AUMs (the amount of forage consumed by a 1,000 pound cow and calf) in Utah.

On June 18, 2014 the Utah Legislature held hearings on why in 2014 there are only 1.6 million AUMs, or a loss of nearly 70 percent over the past 70 years. Forest Service and BLM representatives asked to justify the dramatic drop and how those cuts affect water rights, access, and rural economics.

As permitted AUMs have been dramatically reduced, there has been a corresponding increase in "suspended" AUMs—or currently obligated grazing rights that are being held by the Federal land managers in non-use. Through this process, the Federal Government has gained unused ranchers livestock water rights—defacto water rights illegally absorbed by the United States without compensation. Along with 340,000 suspended AUMs that continue to languish in non-use even while the state of Utah, ranchers and sportsmen invests tens of millions of dollars in feed for livestock and wildlife habitat without Federal agencies increasing livestock grazing.

UNITED STATES FOREST SERVICE

PROPOSED GROUNDWATER RESOURCES MANAGEMENT DIRECTIVE

The Federal Register May 6, 2014, page 25823 states under Regulatory Impact that USDA has determined this is not a "significant directive." It continues, "This directive will not have and annual effect of $100 million or more on the economy, nor would it adversely affect productivity, competition, jobs the environment, public health or safety or State or local governments."

This statement seems to dismiss very real and widespread economic impacts and under further scrutiny appears to be misleading! The Forest Service has a recog-

nized history of reducing livestock grazing in Utah and across the West based citing water as a major reason. Any reduction of sheep or cattle grazing on System lands impacts real ranching families and western communities. In the arid west and particularly in Utah with 67 percent of the state controlled by Federal land managers, there are many counties with 85, 90 and even 95 percent Federal lands. The Forest System lands are where winter snows fall and rain accumulates. This high mountain terrain is generally where water flows and springs are recharged for livestock use and captured for use by rural communities.

The ranching families who depend on Forest access for livestock grazing not only generate real economic activity—they pay taxes, fund hospitals, schools and other critical infrastructure across the Utah and Western landscape!

In the event actions reducing livestock stocking rates are taken by the agency for reduced moisture as proposed in the Directive, with as little as 10 or 25 percent cuts in cattle grazing or as dramatic as 50 percent—the economic impact is dramatic. In southern Utah's Kane and Garfield Counties for example, with private lands making up only 10 percent and 5 percent of the total county land base respectively, cattle ranching is the foundation economic industry. With 12,500 beef cows, all of which spend some time on Forest lands, if the Forest Service cut 25 percent of the cattle, that would reduce cattle sales by more than $3 million and cut economic activity by more than $6 million annually. With a 50 percent cut in cattle grazing those numbers double—more than $12 million is taken from these rural counties annually until the Forest Service restores AUMs.

Considering these potential grazing cut scenarios under the proposed Directive in just two rural Utah counties, it doesn't take very many counties with grazing reductions across the west to meet and surpass the USDA dismissed $100 million mark.

The history of the Forest Service and livestock grazing in Utah is striking when the numbers are analyzed. Utah Forest Service permitted AUMs between 1940 and 2012—the number of sheep and cattle grazing System lands has been dramatically reduced. In 1940, according to Utah State University researchers there were 2,754,586 sheep and cattle grazing AUMs permitted in Utah. In 2012, 72 years later, the Forest Service has reduced that number to 614,682 AUMs—a reduction of 2,139,904 AUMs or a whopping 78 percent!

The history and its economic impact on rural Utah and the state's economy by Forest Service grazing cuts is dramatic. An average sized 500 beef-cow operation grazing on the common lands generates more than $500,000 in direct sales stimulates more than $1 million in economic activity. The heavy cuts in grazing AUMs has robbed hundreds of millions of dollars from rural communities.

The internal obligation of Forest Service employees to implement the agency's Manual, including the proposed Directive, provides an undeniable opportunity to facilitate the agency's historic and recognized attack on western livestock ranching and undermining of longstanding western water rights.

Forest Service Directive System:

The Forest Service Manual contains legal authorities, objectives, policies, responsibilities, instructions and guidance needed on a continuing basis by the Forest Service line officers and primary staff. For Forest Service employees, the agency issues the following warning for not following the agency directives:

> "The Manual contains the more significant policy and standards governing Forest Service programs, and thus the consequence of not complying with the Manual is generally more serious . . ."

The Directive seeks greater authority and control obligating employees to integrate the Forest Service Manual "directives" based on terms like "require," "report," "prevent," and "obtain." These are "action words" that convey to Forest employees and permitted users there is an obligation of compliance and that there are or will be consequences for "not complying!"

Seeking Greater Control of Western Water:

According to the Utah State Engineer, "in Utah the Forest Service lands are those lands where most of our annual precipitation falls and accumulates as snow . . ." There is not a definitive study on what percent of Utah precipitation originates on System lands but it "may well be as much as 70 percent." (See Attachment A)

2560.03 Policy:

2. *Water Resource Connectivity:* The agency cites they will "manage surface and groundwater resources as hydraulically connected, and consider them interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise . . ." This is an obvious attempt to expand the agency's authority. With

such a large portion of Utah's waters originating on System lands, this Directive could impede Utah's current water uses and future water needs.

It is alarming when the agency seeks jurisdictional control based on "interconnectivity"—surface and groundwater. What are the jurisdictional bounds the Forest Service seeks or can legally exercise based on state's rights? Utah's State Engineer expressed concerns about existing diversions and use and the potential for reissuing of permits. He is concerned that the Forest Service may seek and unilaterally establish authority to create restrictions on existing uses under this policy if they decide what they already approved doesn't fit within their new interpretation. And what authority does the policy suggest the agency can exert in not allowing as much use of the water from a source located on System lands as has previously been allowed under state authority and beneficially used under state law. This could create a tremendous frustration and potential legal issues for holder of existing water rights where Utah's Constitution protects against the government "taking or diminishing value" in private property right.

This proposed new policy creates tremendous uncertainty. What might be the impact of Federal dictates on private property rights and what Congress has conveyed as the sovereign waters of the state of Utah?

Utah's State Engineer expressed concern interpreting the policy and implementing what they think the words in the Directive say. There are existing state authorized with long established rights. The holders of water rights must have assurances that their uses and dependency on those sanctioned uses will continue.

4. *Effects of Proposals on Groundwater Resources:* (a) The policy seeks "consideration of effects" and "approving a proposed use" which appears to be the agency seeking to establish a permitting process. Permitting the use of water that is clearly the property and authority of the state of Utah is Federal regulatory overreach. In addition, the slowdown and costs associated with meeting an additional level of Federal review would be unacceptable based on access to and use of private property and the water resources of the state.

(c & d) Policy requiring written authorization, monitoring and mitigation are troubling and suggest the agency is seeking to usurp sovereign states rights while establishing a level of Federal supremacy! This policy proposal could have dramatic impacts including delayed use of groundwater and even surface water resources and potential loss of individual property rights based on time requirement for beneficial use and ultimately forfeiture under state law.

(e) "Obtain water rights" as related to this proposed groundwater policy and in the context of a potentially massive watershed basis—portends major Federal/state framework conflicts. The scope of the overall Directive and the state policy to obtain water rights "for groundwater and groundwater dependent surface water" could provide regional Forest staff the ability to seek and purchase water rights originating on and even off, if they deem that water necessary to carry out the very broad objective of the Manual. This puts the Federal Government, at taxpayer expense, in direct competition with municipalities, farmers, ranchers and other businesses for the state's water resources.

2560.04h—Forest and Grasslands Supervisors:

(5). "Evaluate all applications for state water rights on NFS lands and those adjacent lands with a potential to effect System groundwater resources." This directive seems to challenge or seeks to establish Federal supremacy over state water rights and where the state's are granting water rights and permitting beneficial use activities under state law. The additional assumption that the Federal Government has authority to evaluate and influence in any way the use of water related to "adjacent lands" is in direct violation of Utah's Constitution and protection against "taking or diminishing value" of private property rights.

Groundwater Recharge Zones:

Groundwater recharge zones, located on public or private property, falls under the prevue of Utah Division of Drinking Water. Utah has aggressive state statutes and local ordinances that address the current and future drinking water needs of the citizens of the state. The Federal land managers have an obligation under "federalism" to provide state and local authorities full and unfettered access to implement groundwater protection activities on System lands without Federal interference to carry out its regulatory mandates.

Actions by the Forest Service to reduce or eliminate livestock grazing based on recharge areas and on riparian areas are outside of Federal authority. Addressing water quality and meeting water quality standards is the responsibility of the state. Utah's Strategy for Clean Water has established long standing and successful incentive-based partnership with Utah's farmers and ranchers in place to address non-

point sources of water pollution. The EPA Award Winning Program should be utilized on both public and private lands.

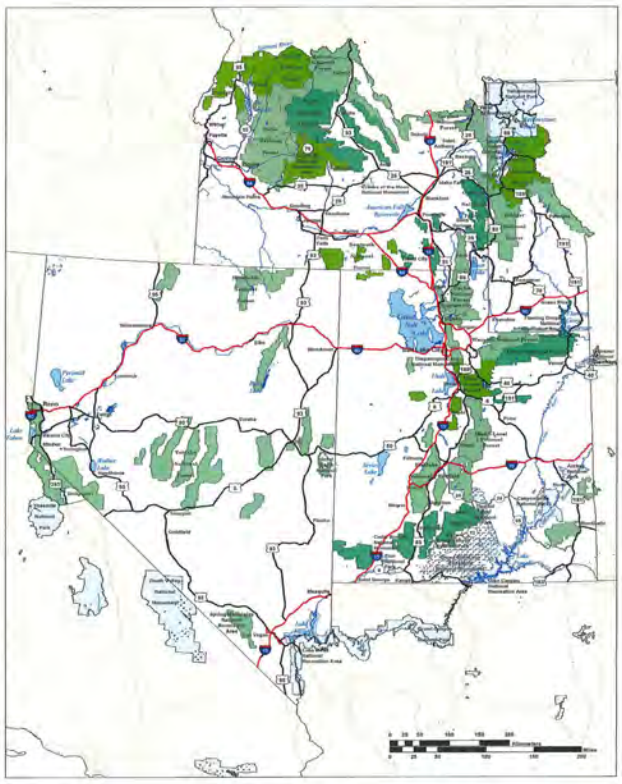
Congressional Oversight:

The Congress of the United States not only has the right, but has the obligation to determine the reach of Federal regulatory agencies. The Farm Bureau calls on Congress to maintain the historic Federal/state framework as it relates to the sovereign waters of the states. This relationship is critically important based on the difference in between eastern and western states and the source of available water supply. (See Attachment B)

Attachment A

U.S. Forest Service

Importance of National Forest System Lands in the Intermountain West Water Supply

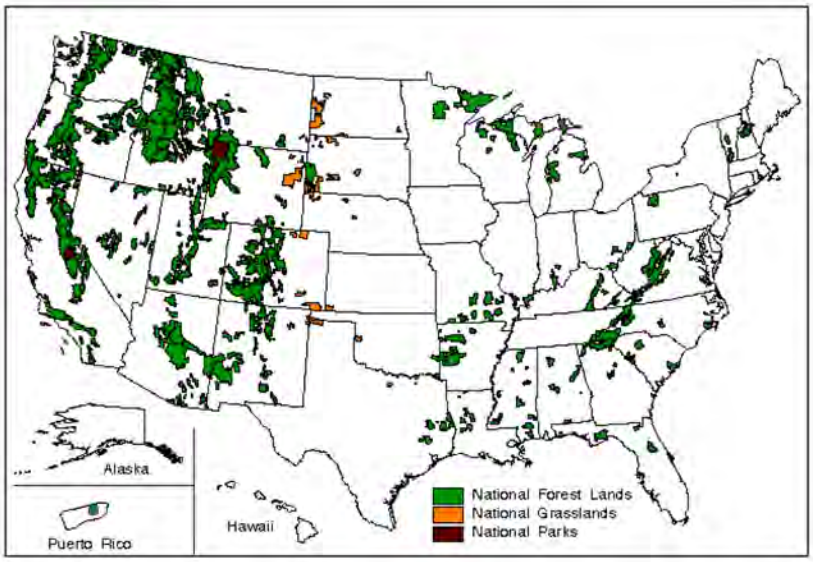


According to the Utah State Engineer, as much as 70 percent of Utah's available water supply originates on Forest System lands.

Attachment B

U.S. Forest Service

Importance of National Forest System Lands in the U.S. Continental Water Supply



National Forest System Lands are the largest single source of water in the continental United States, over 14% of available supply.

Water originating on National Forest System Lands provides a greater portion of the water supply in the western public lands than those east of Denver Colorado.

Mr. MCCLINTOCK. I thank you, Mr. Parker.

I now recognize Mr. Roger Clark, Director of Engineering and Operations of the Associated Electric Cooperative, Inc., which is based in Springfield, Missouri, to testify.

STATEMENT OF ROGER CLARK, DIRECTOR, ENGINEERING AND OPERATIONS, ASSOCIATED ELECTRIC COOPERATIVE, INC., SPRINGFIELD, MISSOURI

Mr. CLARK. Thank you, sir. Chairman McClintock, Ranking Member Napolitano, and members of the committee, it really is an honor to be here. I appreciate the opportunity.

Roger Clark, Associated Electric Cooperative, Springfield, Missouri.

I would be remiss if I did not take a chance to at least shout out to Congressman Smith. Associated has a longstanding relationship with the Congressman, and I know he has not been in Congress that long, but he has still proven a commitment to the rural ratepayers in Missouri for affordable, reliable electricity. We appreciate those efforts.

Associated Electric, formed in 1961, had a pretty simple mission, and that was to provide wholesale power to Missouri, northeast Oklahoma, southeast Iowa, and I emphasize the word "cooperative." That is near and dear. As such, we are a not-for-profit, a private business that essentially is governed by, regulated by, if you will, the people who write the checks for the electricity that we provide.

The other thing that may be of relevance to the committee, Associated Electric is the largest preference power customer from Southwestern Power Administration. We receive about 25 percent of the low cost hydropower that comes out of Southwestern, a very, very important asset for our affordable rates in Missouri.

Associated has a very longstanding commitment to the environment, and as you have heard up here, we are proud of that. We have been recognized nationally for our land reclamation efforts and the work we have done in wildlife habitat. We have been an established partner with Missouri's Department of Conservation, and we have even been recognized as a Conservation Organization of the Year.

We have been involved in a lot of voluntary efforts with U.S. Fish and Wildlife, trying to do things proactively for those species that have been proposed under the Endangered Species Act.

I say that because that is what we have done, but that is not why we have done it. We are committed to the environment because we are owned by the people who live on the land. We are owned by the people who own the land, that make a living from the land. No less than anyone out there, they want to protect water resources. They want to protect air resources. They are concerned.

But that said, we have some serious, significant concerns with the rule proposed recently by the EPA and the Army Corps, specifically with the definition of "Waters of the United States." Probably the easiest way to say it is as this draft is proposed, electric cooperatives just are not going to be able to do what we do best, and that is provide affordable, reliable electricity.

We are dying here. We are drowning under reams and reams of Federal regulation, and while it all may be well intentioned, at the end of the day it is really clear when you are out there trying to put these things into force. It adds delay. It adds complexity, and it adds cost. And plain and simple, the cost is at the expense of the people who are writing the checks, and in our case those are rural Missourians.

One out of every five of our almost 900,000 customers has a total household income of less than $25,000. Almost half of our member owners have a total combined gross income of less than $50,000. These costs are not misguided. These costs put people at—to make very difficult decisions. This is not corporate America. This is not burdening stockholders. This is coming at the expense of rural America and the people that I work and live with.

It boils down to doing the right thing in an efficient way. For us to do our job, we have to maintain almost 10,000 miles of transmission line, and the ambiguity in this rule makes it impossible to understand the exact impact, but what I can tell you is, because we are dealing with what we call a bar ditch and the fact that the bar ditch is now going to be something that is protected as a "Water of the United States" and not understanding how to do that is just going to make it near impossible for us to do our job.

I appreciate the attention of the subcommittee. This and other proposed rulemaking is important to Associated and the other electric cooperatives of this country. I would be happy to discuss issues and answer questions.

Thanks for your time.

[The prepared statement of Mr. Clark follows:]

PREPARED STATEMENT OF ROGER S. CLARK, DIRECTOR, ENGINEERING & OPERATIONS, ASSOCIATED ELECTRIC COOPERATIVE, INC., SPRINGFIELD, MISSOURI

Chairman McClintock, Ranking Member Napolitano, members of the subcommittee. Thank you for inviting me to testify today on "New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs." My name is Roger Clark, and I am the Director of Engineering and Operations for the Associated Electric Cooperative, Inc. (Associated).

Before I begin my testimony, I'd like to thank Congressman Jason Smith from my home state of Missouri. We've had a long-standing relationship with Congressman Smith, but during his short time in Congress he's already proven his commitment to supporting reliable, affordable electricity for the people of rural Missouri. Associated supplies electricity to over 400,000 individuals in Congressman Smith's district, and we know that their interests are well represented here in Washington, DC.

ASSOCIATED BACKGROUND

Associated is owned by six generation and transmission (G&T) cooperatives, which formed Associated in 1961 to provide the G&Ts with a wholesale power supply. These six G&Ts are owned by 51 distribution cooperatives in Missouri, southeast Iowa and northeast Oklahoma that are owned by about 875,000 member consumers. As an electric cooperative, Associated is a not-for-profit, private business governed by our consumers. More than 900 electric cooperatives serve 42 million consumers in 47 states.

Associated has a long-standing commitment to environmental stewardship. We're committed to this cause because we are owned by people who live on the land and want to protect rural America's water and air resources for future generations. To this end, we have 750 megawatts of wind generation under contract, representing 10 percent of the energy used to serve our members. In 2007, this investment earned us the Department of Energy's Wind Cooperative of the Year award. We have also spent over $30 million on energy efficiency for our cooperative members. Over the lifetime of the equipment, these efforts will save enough electricity to serve 60,000 rural Americans for 1 year.

Associated has been nationally recognized for our land reclamation efforts and wildlife habitat development. We've invested $1.1 billion in emission control equipment and have proactively developed and deployed mercury removal technology well in advance of EPA regulations. We've established a partnership with Missouri's Department of Conservation to manage the fishery at Thomas Hill Lake. These efforts earned us the distinguished title of "Conservation Organization of the Year" by the Conservation Federation of Missouri. Finally, it is worth mentioning, that we are proactively involved in voluntary state efforts to develop habitat for species that the U.S. Fish and Wildlife Service has proposed for listing under the Endangered Species Act (ESA). We are committed to these voluntary efforts in hopes that they will give the Federal Government a reason to avoid listing these species under the ESA.

Notably, about 6 percent of our power supply comes from hydropower provided by the Southwestern Power Administration (SWPA). Associated is SWPA's largest customer, receiving 25 percent of the power produced by SWPA. The business relationship between Associated and SWPA represents a long-standing partnership between

electric cooperatives and the Federal Government. It is a model that works well for providing our consumers with reliable, affordable electricity. I would like to thank the members of this subcommittee for your continued efforts to protect electric cooperative access to this vital source of renewable energy.

ASSOCIATED'S CONCERNS WITH THE "WATERS OF THE UNITED STATES" PROPOSED RULE

Associated has significant concerns with the rule proposed recently by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to revise the definition of "Waters of the United States" under the Federal Clean Water Act. Under this draft proposal, electric cooperatives will face significant challenges as we strive to provide our member-owners with reliable and affordable energy. In my testimony, I will highlight several activities related to the transmission, distribution, and generation of energy that may require Federal permits under the proposed rule, causing uncertainty, delay, and cost. The activities we are concerned about include transmission and distribution facilities, vegetation management, new generation, pond management, and mine reclamation.

TRANSMISSION AND DISTRIBUTION FACILITIES

Associated generates electricity at 15 generating units located in Kansas, Missouri, Arkansas and Oklahoma to serve customers throughout a multi-state region requiring an expansive transmission network. As we increase our generating capacity to meet the growing demands of our members, we may also need to build new transmission facilities. Looking forward, Associated and the G&Ts plan to invest an estimated $115 million on primary transmission facilities in the next 10 years, and our experience has been that Federal permit requirements add substantial cost and delays to these projects.

Transmission facilities require regular maintenance, including necessary repair and replacement of poles and towers. In addition, these facilities require upgrades to make the system more resilient in the event of extreme weather events. SWPA and other Federal Power Marketing Administrations that own transmission systems will be affected similarly and any increased costs will be passed on to our member consumers.

Along these lines, we are concerned that under the proposed rule, transmission rights of way may be considered waters of the U.S. Transmission rights of way are often simple ditches alongside roads. These ditches receive road runoff, which could grow cattails even though they infrequently hold water. EPA and the Corps have said that they are exempting ditches that drain only upland and are constructed in uplands, but the term "upland" is not defined. This gives the Federal Government the final say on whether or not ditches are eligible for the exemption.

As a result, we will need a permit from the Corps of Engineers to maintain our transmission facilities. The Corps has a nationwide permit for utility line activities that authorizes up to ½ acre of disturbance for each "single and complete project." Under the current permit, each stream crossing is considered a separate project. However, under the proposed rule, "ephemeral streams" that only have water when it is raining would be considered streams so it will be hard to tell where a "water" ends and land begins.

Given the large number of runoff channels that crisscross the landscape, we could easily exceed the ½ acre limit provided under the nationwide permit. If so, we would have to get an individual permit for each project, which will take time and money. Of course, the additional cost and time associated with the permit do not take into consideration NEPA litigation or Clean Water Act citizen suits that may occur as a result of Federal involvement in the project.

Finally, it's worth noting that along transmission routes Associated operates substations where we store oil requiring a Spill Prevention Control and Countermeasure (SPCC) Plan. The increased scope set forth in the proposed rule would require Associated to expand these plans to take into account the areas not currently considered waters of the United States. This is yet another cost that will impact our member consumers.

The permitting requirements that apply to Associated's distribution cooperatives will delay electric service to new residential, small business, and farm members, as well as any proposed economic development projects. Delays in line construction may force companies that can't wait for permitting in the United States to locate elsewhere.

VEGETATION MANAGEMENT

To maintain the reliable delivery of electricity, we also have to maintain our transmission routes, keeping them clear by controlling vegetation. To do this, we

use herbicides. If our rights of way are considered waters of the United States, we will need a permit to spray herbicides for weed control. EPA and states have issued general permits for weed control, but if you spray more than 20 linear miles, there are added burdens. And, if the area is considered a waters of the United States or potential habitat for endangered species, there will be even more requirements, all triggered by the assertion of Federal jurisdiction.

We also maintain the property around our generating facilities and transfer stations. Using herbicides in these areas will give rise to the same issues. We are concerned that SWPA will face similar issues, incur similar costs, and pass those costs along to electric cooperatives.

NEW GENERATION

Currently coal is our primary source of generation, but looking forward, Associated will continue to invest in a broad portfolio of energy resources to meet the needs of our member consumers. The challenges previously outlined facing transmission facilities also apply to the construction of new generation, and are further complicated by the lack of a nationwide permit for new fossil fuel generation capacity. In fact, the situation will be even more challenging with respect to natural gas plants that require pipelines to transport gas to any new gas-fired plants. As we look to bring new sources of generation on line, we are concerned that the siting and permitting of new natural gas pipelines will be further delayed. These activities become even more critical for cooperatives if we are to meet EPA's proposed requirements to replace coal generation with renewable energy sources and additional combined cycle natural gas generation.

It's also worth noting that the Corps does have a nationwide permit for land-based renewable energy development, but the permit only allows ½ acre of land to be disturbed and just 300 linear feet of stream (unless the Corps waives the 300 feet limit). Given the expanded definitions and uncertainty discussed above, this nationwide permit may have little practical application. For example, most wind farms likely will exceed ½ acre of land.

POND MANAGEMENT

Associated built Thomas Hill Lake to provide cooling water for our member consumers' power plant, but the lake also provides recreation for the community and habitat for wildlife. Associated works with the Missouri Department of Conservation, which manages the lake for fishing and wildlife habitat. Water is vital for power plant operations, and we're committed to ensuring the quality of the small quantity we consume, as well as the quality of the water we return to the pond. Thomas Hill Lake is a water of the United States and therefore we have a permit to discharge our cooling water into the lake. However, under the proposed rule, we are concerned about the status of canals used to channel water to the lake.

In addition to providing cooling water, Associated manages coal combustion byproducts through a combination of practices including beneficial use, mine reclamation, as well as permanent disposal using permitted storage facilities, including ponds. If these ponds are determined to be waters of the United States, Associated may no longer be able to use them for storage and could incur significant costs for alternative management options, costs that we would have to pass on to our member consumers.

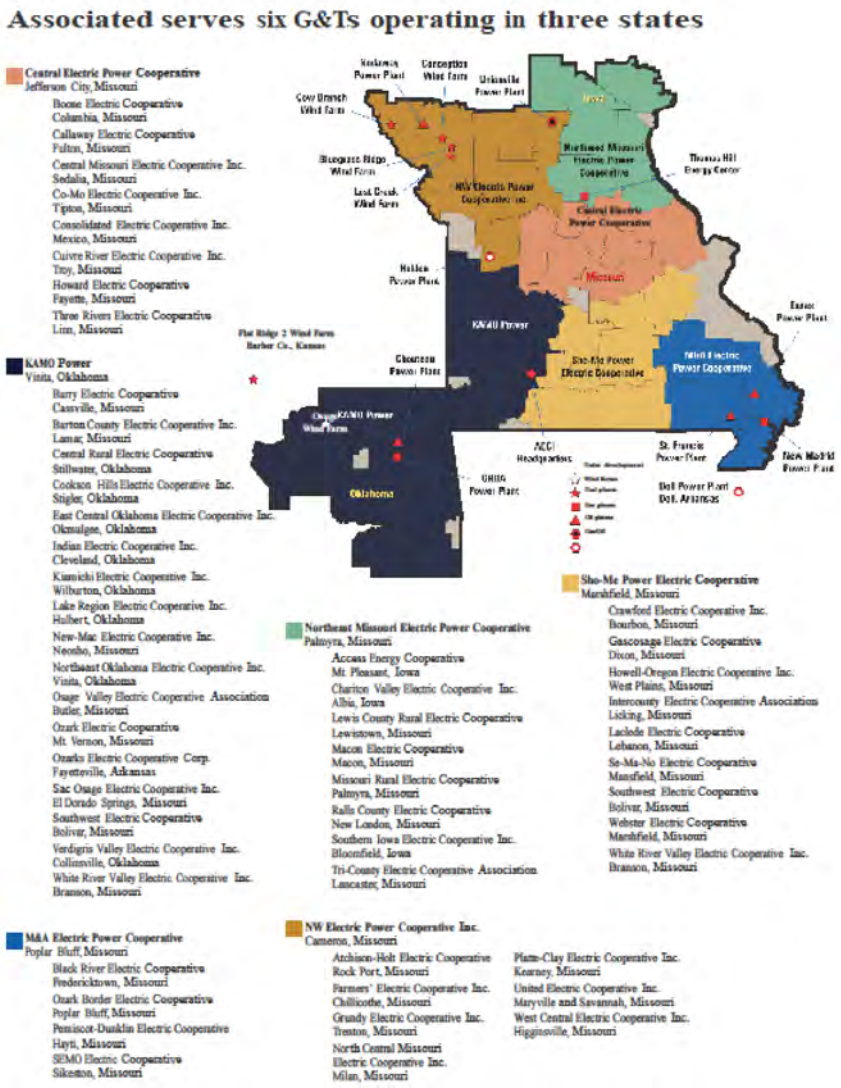
MINE RECLAMATION

In the past, Associated operated coal mines to provide fuel for its coal-fired power plants. We closed those mines after we switched to low-sulfur coal and have been reclaiming the former mining sites, as required under the Surface Mining Control and Reclamation Act (SMCRA). We are very proud of our mine reclamation efforts, having restored thousands of acres of once-mined land to productive pasture, forests and wetlands receiving national awards for "exemplary reclamation." Our concern now is that these activities will subject us to duplicative and perhaps conflicting Federal regulations.

CONCLUSION

Throughout the years of change and challenge Associated has never lost focus on the reason it was formed: to provide economical and reliable power and support services to its members. As we go about providing this necessary service, we are troubled by new regulations that seem to have an outsized impact on rural America. These new regulations make simple business decisions increasingly difficult, and in fact, may conflict with other policy goals. We appreciate the subcommittee's atten-

tion to this proposal of importance to Associated and electric cooperatives throughout the country. We look forward to continued discussion of these issues and are pleased to provide real-world examples of how decisions made in Washington, DC affect the day-to-day lives of rural Americans. Thank you for the opportunity to testify. I would be happy to answer any questions.



Mr. MCCLINTOCK. All right. Thank you. I thank all of the witnesses for their testimony.

I will now begin 5-minute questioning by the Members, and the Chair will begin.

Mr. Martin, numerous communities in the United States are currently dealing with extended drought conditions. Will these

proposals make it more difficult to deal with the drought or less difficult?

Mr. MARTIN. No question it would make it more difficult. Any time you have additional regulatory permitting, it delays many improvements and many projects across the West.

Mr. MCCLINTOCK. What is involved in obtaining these permits from either the EPA or the Forest Service?

Mr. MARTIN. Well, to get a permit from the EPA, it is usually through the Corps of Engineers. In the State of Washington, it is also through the Washington Department of Fish and Wildlife. It is a joint permitting process. Depending on the type of project, it can take years and can takes thousands of dollars.

Mr. MCCLINTOCK. Suppose you just want to grade a road that crosses a ditch, for example.

Mr. MARTIN. Those can take many, many, many months.

Mr. MCCLINTOCK. Many months. How much money is involved in the permitting process?

Mr. MARTIN. How much money? The permit itself is not that expensive.

Mr. MCCLINTOCK. No, but meeting the requirements.

Mr. MARTIN. It is all of the time and effort, and many times you have to hire experts who can analyze what the sort of effect will be to get that permit.

Mr. MCCLINTOCK. I represent a large portion of the Sierra Nevada which have gullies running throughout it. There are an awful lot of water conveyances dating back to the mining days over 100 years ago that are still operational, pass through many, many people's properties, small creeks, streamlets and the like.

If a small gulley running through your property joins another creek that joins another creek that joins a stream that joins a navigable river that runs through Forest Service land, under the proposed Forest Service rule, would I have to obtain a permit if I wanted to grade a driveway that crossed that gulley?

Mr. MARTIN. I wish I could tell you for sure, but my guess under the proposed rule would be yes.

Mr. MCCLINTOCK. And what would that involve me doing as a property owner?

Mr. MARTIN. You would have to go through the Corps and the EPA and probably additional maybe state regulatory agencies.

Mr. MCCLINTOCK. Now, the EPA says that the "Waters of the U.S." rule is going to create more certainty. Does anybody agree with that?

Mr. MARTIN. Not I.

Mr. MCCLINTOCK. Anyone?

[No response.]

Mr. MCCLINTOCK. Mr. Clark, how would the "Waters of the U.S." proposal make permitting more difficult and costly for your members?

Mr. CLARK. Quite simply, it is going to add time. Time is delay. We have crossed over to the point now where even with our given regulations, it takes longer to permit a transmission line than it takes to build one.

Mr. MCCLINTOCK. And I assume delay means money.

Mr. CLARK. Delay means money.

Mr. MCCLINTOCK. And who ends up paying for that?

Mr. CLARK. It is the ratepayers of the rural Missouri.

Mr. MCCLINTOCK. Both the Forest Service and the EPA failed to consult with the states during the development of these proposals. This is on top of the fact that the Forest Service has been working on the Groundwater Directive for 8 years.

On the Clean Water Act rule, the EPA denied requests by the states to have representatives on the Scientific Advisory Board that was instrumental in informing that rule.

Mr. Tyrrell, was there any consultation from the Forest Service with your state over these 8 years?

Mr. TYRRELL. Mr. Chairman, no, not to my recollection. We were not consulted in the preparation of the draft.

Mr. MCCLINTOCK. And on the EPA's water rule, did the EPA give you any good reason why a state expert could not sit on the Scientific Advisory Board that informed the rules development?

Mr. TYRRELL. Mr. Chairman, I know that the State of Wyoming DEQ asked to have a representative on that board and that was not allowed.

Mr. MCCLINTOCK. Were you afforded any meaningful opportunity to review and comment on the science used to justify the rule-making before the EPA sent the rule to the Office of Management and Budget?

Mr. TYRRELL. Mr. Chairman, no, we were not, and I think Western States Water Council has also opined on the lack of consultation with the states in general.

Mr. MCCLINTOCK. Mr. Martin, your testimony details how the existing Clean Water Act impaired your client's ability to implement state or local conservation planning. After 4 years of negotiations and discussions, your client was able to go forward on this project.

Witnesses have said that the proposals we are considering today will actually complicate regulatory matters. How will the proposed "Waters of the U.S." rule and the Forest Service Groundwater Directive impact local irrigation districts that want to create storage and conservation projects that benefit people and species?

Mr. MARTIN. It will slow the process down and cost a tremendous amount of money just to obtain any sort of a permit.

Mr. MCCLINTOCK. Mr. Clark, final question. Could you explain the ambiguity of the "Waters of the U.S." rule in terms of how transmission rights-of-way might be treated?

Mr. CLARK. I can explain it in terms of words like "upland." There are things that we do not understand. They are not clearly defined. The impact of that is just going to be misinterpretation. It is going to be challenges. It is going to be lawsuits, and it is going to be financial consequences.

Mr. MCCLINTOCK. Thank you.

The Chair now recognizes Mrs. Napolitano for 5 minutes.

Mrs. NAPOLITANO. Thank you, sir.

And while it has been brought up several times that the administration did not show up, I would like to clarify that EPA was not invited.

For the record, Mr. Chairman, I have a letter I sent to Gina McCarthy, dated June 19, with some questions that would have

clarified some of it for the record, and the second one is a memo from the Department of the Interior in regard to today's hearing.

Mr. MCCLINTOCK. Without objection.

Mrs. NAPOLITANO. And I will state for the record I will quote from it that there are other issues, and I would like to share this with you after the hearing so that you understand what they are answering to us as a committee.

What they do state in paragraph 3 is that they will leave it to EPA and the court to discuss the details of the proposed rule. It is our understanding that the proposed rule is not designed to expand the applicability beyond existing regulation, and that is not designed to cover groundwater, and the rule does not expand the access reach to cover additional irrigation or alter existing water transfers, et cetera, et cetera.

I would like to make sure that we share that with you so that you understand what they are saying.

Also, if you are interested, we have and will get to you via some email capability the answers to some of the questions that were in the Transportation and Infrastructure Subcommittee to deal with some of the issues that you bring up today, Mr. Chair. I will deal with that later.

But I would like to ask Mr. Martin. You are concerned about the proposed rule, that it would dictate the tributaries be jurisdictional along with water adjacent to tributaries and manmade conveyances. Are these features you raise concerns about jurisdictional under current rule? Are they jurisdictional under the current rule?

Mr. MARTIN. If I understand your question, it is subject to the interpretation usually of local Corps people, and the people that we have run into have said that, yes, they are jurisdictional.

Mrs. NAPOLITANO. Well, I would like to be able to see something so that we can take it up with the Corps because if it is not in the rule, then they should not be acting differently.

Mr. MARTIN. We agree.

Mrs. NAPOLITANO. And again, Mr. Martin, in general, if the jurisdictional determination has already been made and they are considered "Waters of the U.S.," now then they would continue to be considered "Waters of the U.S."

If a jurisdictional decision has been made and they are not covered, then the rule would not expand coverage to them.

Where in the proposal do you read that this expands coverage to those facilities?

Mr. MARTIN. Because it talks about all ditches. Even though it says that they will be excluded, if you look at the definition of exclusion, there are enough questions there that it appears they come in the backdoor and they particularly include all ditches because of their connection to tributary waters.

Mrs. NAPOLITANO. Well, that is something that maybe needs some clarification rather than the assumptions that it will impact them.

Mr. MARTIN. We would like to have that type of clarification.

Mrs. NAPOLITANO. Mr. Lemley, you spoke about the importance of clean water to the craft beer industry. I have one of those facilities in my area. So I understand the issue that they have already spoken to us about.

Would you tell us the importance of the industry as an employer and also as to the local economies nationwide?

Mr. LEMLEY. Of course. Thanks for the question.

According to the Brewers Association, which is our national trade group for craft brewers, the 2012 economic impact study was their latest available. The craft brewing industry contributes $33.9 billion to the U.S. economy. That represents the impact of those 2,700 brewers, those 110,000 jobs, plus another estimated 250,000 jobs in both distribution and retail tiers.

And all of those businesses by the Brewers Association definition are American owned companies.

Mrs. NAPOLITANO. Would there be any other benefits that you could enumerate on?

Mr. LEMLEY. Oh, of course. The number one benefit will be to ensure there is clean water to craft beer with. Of course, agriculture is very important to us. We may not completely agree on this one, but we need those agricultural products. It will ensure safe drinking water, we believe, to be available to approximately 117 million more Americans.

And, you know, these rules as we have seen in Fort Collins, they hopefully prevent flooding, filter pollution, and supply critical fish and wildlife habitat. We saw that first hand in Fort Collins last year when we experienced flooding.

Mrs. NAPOLITANO. I think it is related to it, but do you believe that the clean water rule helps provide clarity to businesses that depend on our clean water?

Mr. LEMLEY. We believe that it helps provide clarity for our business, absolutely.

Mrs. NAPOLITANO. Thank you.

Mr. Tyrrell, your testimony brings up concerns regarding the treatment of groundwater and the proposed "Waters of the United States" rule, yet for the first time the proposal explicitly excludes the definition of groundwater. Would you not agree that that is an improvement over the previous rule that does not explicitly exclude groundwater?

Mr. TYRRELL. Ranking Member Napolitano, I think that the confusion is that there is an exclusion for groundwater, but the inclusion of shallow subsurface water. In Wyoming, subsurface water is groundwater. So conceivably you will have a shallow subsurface connection between surface water bodies that may be jurisdictional aside from the exemption of groundwater in the rule. So it is really a clarity issue.

We do not understand how shallow subsurface is not groundwater.

Mrs. NAPOLITANO. Again, clarity. Thank you, Mr. Chairman.

Mr. MCCLINTOCK. Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman.

I would like to thank our panel for taking the time to be able to be here.

This is a disturbing onslaught, Mr. Chairman, that we are seeing come out of this administration, again, with the blue rays. Then we had conditional use of permit. We now have the regulatory scheme coming out of the EPA, which is essentially the biggest water grab in American history in my estimation, now being supplemented by

the Forest Service with their groundwater rules, impacting our states, impacting our communities, impacting our ability to be able to deliver affordable electricity for many of our communities.

My district is much like the one you described in Missouri, not a lot of income coming in, but our senior citizens, our young families trying to be able to get a start are seeing more and more of their income being eroded by regulatory taxation, and this is of deep concern running throughout the West where water is a private property right.

We have state law, and we have priority-based systems, which have worked well, to be able to provide clean, affordable water, hydroelectric power, ability to be able to grow our crops.

But as I have listened to your comments going through, we are seeing that we are not seeing clarity come out. Mr. Martin, you just talked about the ditches once again. We are going to exclude ditches, but ditches are covered.

So do you have any idea what you are talking about, what the end game is, what the result is going to be?

And have they asked you?

Mr. MARTIN. I do not. I think I would probably have to hire either a hydrologist or a hydrogeologist to make a determination every time I needed to do a little bit of work on a canal or ditch to figure out whether it was excluded or not excluded.

Mr. TIPTON. So essentially the government is ringing the door saying, "We are here to help you." You are actually going to see some hurt come out of this. It is going to cost more money, is it not?

Mr. MARTIN. And it is going to delay very needed and very good projects.

Mr. TIPTON. Does the Forest Service Directive, Mr. Martin, run contrary to longstanding Federal policy respecting the rights of states in regulating groundwater?

Mr. MARTIN. No question. Every state has their own authorities and laws on how they regulate groundwater. The Forest Service is apparently trying to jump over that.

Mr. TIPTON. What impact, if any, will the proposed rule, the Forest Service Directive on groundwater, have on pending reserved water right claims in states like mine, Colorado?

Mr. MARTIN. It is going to have an adverse effect because now states are going to have to determine how the Forest Service rules and directives apply to state groundwater rights.

Mr. TIPTON. And particularly when you are a headwater state like Colorado and some of our neighboring states in the West, right?

Mr. MARTIN. That is correct. The State of Washington is very similar to Colorado. I believe all of our reservoirs in the Yakima Basin are on Forest Service lands.

Mr. TIPTON. I think this is important because this is supposed to be a transparent administration. These are policies coming out of appointees who are put into office right now. Do you feel that the impacted stakeholders like yourself were adequately consulted during the development of this Directive?

Mr. MARTIN. Not at all. My understanding, this Rule has been under consideration for 8 years, and this is the first we have heard about it.

Mr. TIPTON. So we have a policy that has been moving for 8 years. It is the first you have heard about, no real contact coming through. How does that make you feel?

Mr. MARTIN. Not very good.

Mr. TIPTON. Not very good. I can imagine.

So, Mr. Tyrrell, in the State of Wyoming, you guys are feeling some of the impacts that I know we are in Colorado as well. The Forest Service has stated in its submitted testimony, and I will quote this, "Nothing in the proposed directive would affect states' role in the management of water rights."

If the Forest Service would actually have shown up here today to be able to testify, they could probably go into details about that statement, but you deal in state water rights every day. In your expert opinion, the Forest Service statement I read, is that correct?

Mr. TYRRELL. I do not believe it is, Representative Tipton. I do think it certainly had clarity problems much like the WOTUS rulemaking. We do not know the effect of their groundwater management implications on forests. We do know that they are seeking by assertion a reserved right to groundwater, which I think is inappropriate. That would put a priority pinch on junior appropriators already on the force.

So the effects of the Directive are unknown and certainly scary at this point.

Mr. TIPTON. I think that is part of the challenge that we are seeing, do you not? We are going after the surface water. Now we are going after the subsurface water that is coming in, the groundwater that is coming in, and these policies and the impacts that they are going to have on our communities have the great potential literally to be devastating to our farm and ranch communities and our ability to be able to generate that hydroelectric power and to be able to provide for some of the essential needs that we have in each of our states.

So thank you for being here.

Mr. Chairman, my time has expired.

Mr. MCCLINTOCK. Thank you, Mr. Tipton.

Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman.

First to Mr. Lemley, I appreciate the fact that you mentioned the hops and barley in the Yakima Valley, but be it known that we are doing some great barley and doing a lot of hops research in the Willamette Valley, and before our blight back in the 1930s, we were the principal producer, and we are coming back.

Mr. LEMLEY. And we use both. So thank you.

Mr. DEFAZIO. Yes. Just added. Sorry, but I had to.

Mr. Clark, regarding the co-ops, there are a number of questions you raise in your testimony that I wonder if you have directed them to the Agency and asked specifically because none of these are concerns about the transmission distribution and the ditches that might run along your right-of-way to get in there and maintain those, and whether or not even though those are uplands, whether those would become regulated in any way, et cetera?

I mean, have you directed some of the issues you are raising in your testimony to the Agency to say, "Can you clarify this for us now?"

Mr. CLARK. It is my understanding that there have been some questions asked. I believe that that is going to be an interpretation that is going to be on a project-by-project basis. Where the next new transmission or where we are working to maintain the existing transmission line, what structures are going to be replaced? As you are standing there, someone is going to be faced with the decision of does this particular ditch, creek, stream apply to this definition.

And I do not believe without clarification in the document beforehand that you can address your questions adequately in advance. It is going to be administered in the field by the boots on the ground, the local Corps administrations and their interpretation as to whether or not you need a 404 permit.

Mr. DEFAZIO. But if they were to better defined "upland," I mean, I assume that most of these ditches you are talking about are not permanent flowing and they do not directly connect into another body of water which is jurisdictional or into a wetland, which is jurisdictional.

Mr. CLARK. I believe in most cases that would be correct.

Mr. DEFAZIO. OK. So if you had a clear definition of "upland," it would mean some certainty.

Mr. CLARK. It would provide additional clarity, yes, sir.

Mr. DEFAZIO. OK. And then there was one on ponds management. Again, you are concerned about the status of canals used to channel water to the lake. Has that one been addressed directly, you know, to the Agency?

I mean, it seems to me the way to comment on the proposed rule is either to raise these questions in the proposed rule and say, "We are concerned. These things need further definition. You know, they should be exempt activities," or to try and get the Agency now—it is not always easy to get them to do that—to say, you know, "No, actually that will be exempt under this rule."

I mean one way or another, because this is a proposed rule.

Mr. CLARK. There have been general questions submitted, but with regard to how it applies to a specific project, you are never going to get clarity until you are faced with that decision.

Mr. DEFAZIO. Well, there can be categorical exclusions of certain types of projects.

Mr. CLARK. And our experience and what I have seen in this proposed rule is these exemptions. The category exclusions are strict to the point where a half of an acre for a transmission line does not allow for the exclusion that I believe the exclusion was intended for. It is going to require every crossing to pass a litmus test of whether or not that qualifies as a "Waters of the United States."

Mr. DEFAZIO. Half acre, is that for the entire length of the line no matter how long it is?

Mr. CLARK. It is a by project definition, yes, sir.

Mr. DEFAZIO. And what is a project definition? I mean, if I am building a 20-mile long transmission line, is that a project?

Mr. CLARK. It used to be a project, and now I believe it is going to require a by body crossing, and that is exactly my point. The rules are changing such that there is not clarity as to what you are even permitting when you go for an initial permit.

Mr. DEFAZIO. OK. Well, again, as I did in my opening statements, I suggest you make these as very specific concerns addressed to the Agency in its rulemaking. I have to admit that I am not intimately familiar with this particular rulemaking. I have been working on another one which has to do with oil tank cars I am more familiar with and just talked to the head of OMB, was doing that yesterday about how that rule might be, and he agreed with a number of concerns I raised.

So I mean, we should not just say they will not listen. We should try and make them listen and propose reasonable concerns to them during this comment period. That is what the law allows for and that is why we got an extended comment period.

Mr. CLARK. I appreciate your comments, and we do participate in those comment periods.

Mr. DEFAZIO. Thank you.

Thank you, Mr. Chairman.

Mr. MCCLINTOCK. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Clark, thanks for being here today. Your testimony noted, I think, 5 to 6 percent of Associated's power supply comes from hydropower provided by the Federal Government's hydropower projects. As an electric co-op, please provide additional detail about the importance of the Federal hydropower to your member consumers.

And I would love to hear your concerns in general about how these new regulations like the "Waters of the U.S." proposal may affect electricity for all rural Missourians.

Mr. CLARK. Specifically with regard to Southwestern Power Administration, I made a brief reference to that earlier. Low cost hydropower is very important to us in two ways. We are able to schedule the low cost hydro at the most critical times when the electricity is the most expensive, and also the supplemental, the gift from God rain that we get provides us with the cheapest form that we can use to provide power to our neighbors or to our members. Very critical to manage our system, and it keeps costs low.

Southwestern Power Administration, by the way, is also an owner and maintainer of transmission, and what I would say is they will be faced with the exact same challenges to interpret and implement these same forms of overregulation that any utility will, whether it be a cooperative, Southwestern is going to have the same costs that they will charge through to the reference power customers. Associated will pay 25 percent of that.

Mr. SMITH. I thought your testimony in making the statement that it is longer to go through the permit process to build the transmission lines than to build it feels like it is something very similar. It is longer to get the permit approved for the Keystone Pipeline than it is to build the Empire State Building. So it is like a common theme right now that we are facing.

Mr. Parker, I have a clarifying question about the testimony submitted by the Bureau of Reclamation. I would ask them, but apparently, of course, they are not here. They wrote, "We also appreciate that the rule does not change in any way existing Clean Water Act exemptions from permitting for discharges of dredged and/or fill material in Waters of the U.S. associated with agriculture."

Mr. Parker, that statement seems to me to be quite misleading at best. Is it your understanding that this rule will not affect Clean Water Act exemptions for agriculture?

Mr. PARKER. Well, I think that is a misstatement. As you look at the impact on agriculture, there is an exemption for 56 practices, I believe it is, but you have to follow NRCS guidelines in order to establish and meet that exemption.

Now, I guess some questions and uncertainty come into play here. Is NRCS, that heretofore has been a friend of farmers and ranchers, are they becoming regulatory and are they going to be a policing agency?

Also, not all producers participate with NRCS. How do they participate in the exemption?

I think the most telling concern we have is that this new level of potential regulation, if you don't meet, opens our farmers and ranchers up to citizen lawsuits. So if somebody was to establish and tell us there is more uncertainty in agriculture as exempted, I think just the opposite, Mr. Smith, is occurring.

Mr. SMITH. Thank you.

Mr. Martin, in the Bureau of Reclamation submitted testimony today they also stated that the EPA and the Corps included a proposal exclusion in the rule for ditches, excavated wholly in uplands and draining only uplands with less than perennial flow, including those that may carry groundwater.

In light of your testimony today, can you explain how this statement is also misleading and may lead individuals who operate drainage districts, like those throughout my district, believe that they have an exemption when they actually do not?

Mr. MARTIN. Well, if you look at the first part of the exemption when they just say "ditches," you would think you might be excluded, but then you have to get into the as long as they meet these certain requirements, which is the "wholly" in uplands. Uplands is not well defined. Draining only uplands, not well defined.

Many ditches can be hundreds of miles long. Are they draining only uplands for the whole 100 miles? And even if they drain something that is not an upland for just a small portion of that ditch, does that bring the whole ditch into the jurisdiction, Federal jurisdiction?

And then you also talk about less than perennial flows. Many of these ditches do flow on a year-round basis, but the source of the water is no different than if they were an intermittent stream. These are irrigation Ag. return flows in these ditches, and just because you have them on a year-round basis, now are all ditches now back-included?

Those are just some of the questions that we have on the Rule.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. MCCLINTOCK. Mr. Huffman.

Mr. HUFFMAN. Thank you, Mr. Chair.

I want to thank the witnesses for their testimony.

You know, maybe there is some valid criticism to the point that some additional specificity would be desirable in a few of these areas, after listening to the testimony and reading through the record. However, I think it is unfair to proceed with all of these worst case scenarios and hyperboles and colloquies about what if this interpretation was given to this type of ditch and additional permitting and additional burdens, et cetera, extending into some fairly wildly exaggerated scenarios.

To have that kind of colloquy as if there has not been very specific testimony from the administration on many of these exact same points, the Transportation and Infrastructure Subcommittee had a hearing where the administration was asked about these things, many of the same scenarios that the Majority and the witnesses here have brought up as fears and concerns, and they were answered quite specifically.

And it is very clear from this record, and if we are going to have an honest discussion about this we need to acknowledge it, that this is not an expansion of Clean Water Act authority. It is just not. In fact, fewer ditches are covered under this proposed new guidance than were covered under the 2008 guidance.

We have question after question that has been asked of administration witnesses: ditches on mine sites, prior converted croplands, wastewater treatment, other ditches, uplands, artificial lakes, a channel created by a washed out irrigation ditch, on and on. All of these scenarios were put to administration witnesses.

And on point after point after point the answer was very clear: no, those are not covered. Those are not jurisdictional. There is no new expansion of authority. There is no new permitting.

So to continue to pretend like this is some vast overreach, frankly, I think, calls into question the credibility of this hearing.

I am also struck by the selective interest in deference to states on water rights because I am hearing that theme a little bit, especially with respect to groundwater.

And, by the way, I want to commend Wyoming and other states that do regulate groundwater. I come from California where it is the wild Wild West truly, and we have no regulation of groundwater. So hats off to you folks in other western states.

But it was just a few months ago that this House passed, with the Republican Majority largely passing it, a bill that would have run roughshod over 100 years of California water rights, would have stripped control and authority from the State Water Resources Control Board, and basically laid waste to all sorts of water rights provisions in the State of California.

My understanding is there are negotiations, possibly a coming Conference Committee, taking place on that bill right now, but water rights in the State of California did not seem to trouble the Majority one bit when we passed that sweeping, preemptive piece of legislation a few months ago.

And if I am not mistaken, a couple of my colleagues on the Majority served with me in California when I and others were always trying to give the state more authority to regulate groundwater. We never were successful. That was always fiercely opposed.

However, we see here a hearing that is sort of premised around the idea that the Federal Government on the Forest Service lands should leave this groundwater stuff to the states. Well, it seems to me now we are really in an interesting predicament because if you do not want the State of California to regulate groundwater and you do not want the Federal Government to regulate groundwater, then I guess we are in a situation where this is just not a very serious policy inquiry. Whatever this hearing may be about, it does not appear to be about any kind of consistent or coherent deference to states or water policy or an honest look at the record that has actually been produced by the administration on what these proposed rules actually mean.

So that was a statement and not a question, but I will ask Mr. Tyrrell one question in the time I do have remaining. I appreciate your testimony because it goes to the point that our clean water laws are actually important to our country, to our economy.

And I guess I want to ask you in a fairly open ended way. You are a businessman. Do you think it is appropriate as a business operation that you are required to have pollution controls if you discharge into small streams and wetlands and tributaries that contribute to the Waters of the United States?

Mr. LEMLEY. Sir, are you asking me or Mr. Tyrell?

Mr. HUFFMAN. Mr. Tyrrell. I am sorry. No, my witness from the New Belgium Brewery.

Mr. LEMLEY. Yes, sir. That is me.

Mr. HUFFMAN. Yes.

Mr. LEMLEY. Of course we believe that if it were to discharge water into stream, headwaters, ephemeral streams that we should be regulated. We have a storm water permit for our storm water at the brewery and all of the required permits for our wastewater treatment plant.

Mr. HUFFMAN. Great. Thank you all for your testimony. I appreciate it.

Mr. MCCLINTOCK. Mr. Gosar.

Dr. GOSAR. Thank you, Mr. Chairman.

On June 2, Congressman David Schweikert and I held a joint field hearing in Arizona on the EPA's proposed rule to expand the definition of navigable waters of the United States. Five Members of Congress, including Lamar Smith, Chairman of the House Science, Space and Technology Committee, participated in the hearing, and we heard testimony from nine Arizona witnesses.

That hearing provided some great insights in regards to real people in Arizona who will be negatively impacted by a rule made here by bureaucrats in Washington, DC. Let me highlight some of those.

Stephanie Smallhouse, testifying on behalf of the Arizona Farm Bureau, testified that the newly proposed EPA rule for "Waters of the U.S." would be devastating to my family's farming operation, as well as hundreds of others in agricultural entities in Arizona. This proposed rule is an economic disaster and a dream killer for my kids.

Bob Lynch, a very accomplished water attorney, testifying on behalf of the Irrigation and Electrical Districts Association of Arizona said, "The EPA and the Corps have driven a truck through Justice Kennedy's opinion in *Rapanos*. This may be the biggest jurisdic-

tional overreach I have witnessed in 50 years of law practice. I hate to say it, but the only people who are coming out ahead on this proposed rule are lawyers."

Just like the hearing we are holding today, the Agencies are invited, and just like the hearing we are holding today, not one Agency official showed up to hear from real people or answer questions about the proposed rule.

I want to make sure that all the people who took the time and effort to participate in the 3-hour June 2 Arizona hearing have their voices heard. Mr. Chairman, I would like to ask permission to submit the witness testimonies and statements from the hearing for the Record.

Mr. MCCLINTOCK. Without objection.

Dr. GOSAR. I do have a few questions that I would like to take the time to ask.

Now, the "Waters of the U.S." proposed rule directly contradicts aspects of four U.S. Supreme Court decisions. These decisions have restrained Federal agencies and imposed limits onto the extent of Federal Clean Water Act authority. Mr. Martin, Mr. Tyrrell, Mr. Parker and Mr. Clark, do you believe the EPA is overreaching with the "Waters of the U.S." proposed rule in regard to the Supreme Court?

Mr. MARTIN. I do.

Dr. GOSAR. Now, Mr. Lemley, are you familiar with the Constitution?

Mr. LEMLEY. Yes, sir.

Dr. GOSAR. And the law of the land is held by what? The last jurisdiction would be what? Would it be the Supreme Court?

Mr. LEMLEY. Yes, sir.

Dr. GOSAR. Are you kind of taken back that there were actually four decisions that contradict this expansion of power? Does that kind of concern you?

Mr. LEMLEY. No, sir, it does not because——

Dr. GOSAR. Really? Whoa, whoa, whoa. So the law of the land, the Supreme Court jurisdictionally is number "uno," right? You just said that. So that does not bother you, that you are accepting that the Federal bureaucracy is superseding the Supreme Court? That does not bother you?

I think that is interesting.

Mr. Tyrrell, you testified that the authority for the proposed directive on groundwater management does not exist. If there is no statutory authority that exists, how does the Federal Government satisfy asserting Federal reserve rights to groundwater?

Mr. TYRRELL. Mr. Chairman, the only time I have seen a Federal reserve right asserted in any type has been either through congressional action or through the result of the state or Supreme Court litigation or settlement. I have not seen it asserted as policy before, and that was troubling to me.

Dr. GOSAR. Especially in light of what I just cited.

Mr. Tyrrell, you also testified that the Forest Service Groundwater Directive will harm state's rights negatively and negatively impact your state's water users. In a time of extreme drought in the West and scarce water resources, how concerning is this directive?

And can you elaborate on some of the possible consequences for state and private water users?

Mr. TYRRELL. Mr. Chairman, Representative Gosar, yes, the concern, number one, would be timing. To the extent the Directive would delay or impact anybody being able to get a permit on the Forest if they are not the Forest, and we do issue permits to grazing permittees, water right permits to grazing permittees for wells, stock ponds on Forest property. I do not know the impact at this point of the Groundwater Directive on those people's ability not to get my permit, but to get the ability to build it on their allotment.

Second, the purported connection or the presumed connection of groundwater to surface water has impacts that we cannot see. If that connection which is contrary to Wyoming State law, by the way, which we presume that groundwater and surface water are separate until they are shown to be connected, and then we regulate them in that way; if the connection is presumed to exist, there could be effects on surface water in the regulation of those surface waters and work on diversions, et cetera, because of the groundwater connection. That is a concern of ours.

Dr. GOSAR. Well, in Arizona, it is the same way. We have some delineation just like Wyoming does. So we do have the same concept of oversight.

So thank you, Mr. Chairman. I yield back.

Mr. MCCLINTOCK. Mr. LaMalfa.

Mr. LAMALFA. Thank you, Mr. Chairman.

I, too, come from California, the far north part where we fight against regulations, overreaches all the time. So we do get into conundrums sometimes. Do we want to be more heavily regulated by a state or a Federal body? For me it comes down to what provides the most freedom.

In California that might more often be maybe a Federal reg. In other free states like Wyoming, you might be safer under a state reg. So it is kind of a tough deal one way or the other. On my side, my tie goes to the citizens.

So it is fascinating the different ways things can be interpreted in this process. So just a question for Mr. Lemley from New Belgium Brewing Company.

You have growers you contract with for your barley and your hops and some other inputs used, grains. Do they know about your position on these? Are they part of your trifold on sustainable growing and all of that that you have put out for people to see in Fort Collins and stuff like that?

Mr. LEMLEY. I am sure they are aware of our position on this. We have been very public about it.

Mr. LAMALFA. OK. All right. I have a lot of grain growers in my district I know of and across the Fruited Plain, Farm Bureau guys, and a lot of them are not happy with these new regulations. They feel like, as in my opening statement, if they want to change their irrigation system in any way now they are going to be subject to that being a waterway of the United States or somehow navigable.

What are the lines of beer that you all have? Fat Tire is one of them?

Mr. LEMLEY. That is correct. Yes, Fat Tire, Ranger, Shift.

Mr. LAMALFA. Ranger, Shift. OK.

Mr. LEMLEY. Several beers every year.

Mr. LAMALFA. OK. My guys will be interested in what beer products they will be drinking after work.

So Mr. Tyrrell, the EPA's proposed redefining of these waterways of the United States under the Clean Water Act broadens existing categories—I do know how it can be interpreted this is somehow narrower or lesser—of Federal jurisdiction in the tributaries, et cetera, and areas of jurisdiction like shallow subsurface water connections. This is new stuff.

We have heard about the Supreme Court opinion that states that Federal water jurisdiction is not unlimited, or meaning is limited. We heard EPA's proposed rules consider most, if not all, waters interconnected without regard to how much or how often they actually contain water.

There are supposed to be exemptions, such as a heavily qualified exemption in the rule for ditches, draining upland as we talked about a little bit earlier, not well defined, subjective determinations and litigation. And this is the scary part for my growers, for my constituents because they are subjective.

So maybe you have one representative coming out to check on what you are doing or flying over, whatever they do. They might think it is OK this day, this week, and then the next time you go to do it on a different field, changing a crop, plowing or whatever, you might have a different bureaucrat that shows up and says, "You cannot do that, and we are going to haul you into court," as some of my people have been threatened under lawsuit, litigation, and it goes on for months, and years before they even get an answer.

So they are sitting there with their land tied up, unable to be productive on it, still paying taxes, still making land payments, all of that because a bureaucrat or someone has a threat against them.

So, Mr. Tyrrell, with all of the different ways EPA can find a water to be jurisdictional under the proposed rule, can you think of a water body that would not be under Federal jurisdiction under the proposed rule?

Is there anything that can really and truly be exempt, again, taking into account a different interpretation by a different bureaucrat, different day to day?

Mr. TYRRELL. Mr. Chairman, Representative LaMalfa, I cannot off the top of my head, and the concern is that with the proposed rule we have talked to the local Corps office, for example, and it looks to be case by case, which means there is a lack of clarity in knowing whether you are impacted or not.

Mr. LAMALFA. If you get an opportunity to litigate or fight or whatever, maybe in every case what you may want to do even if you are putting in a pipeline for better water efficiency, better water retention, in your own blankety-blank ditch, I mean, I have a farm. OK? My family, those before me, built the drainage ditches. They built the irrigation ditches. Now someone is telling me that these are no longer mine. They belong to the Federal Government basically.

I do not see them paying the taxes on it. If I just decide to fill that ditch in because I am tired of it, am I going to have to hear from them on this?

I mean, where does it stop?

Mr. TYRRELL. Once again, I think I do not know. The clarity is the issue for me. When ditches are referred to as constructed wholly in uplands, that is of no help to me because our water users have to have one end of their ditch on the creek, and most of the ditches that our water users are concerned about and that I am concerned about on their behalf are those that divert water for irrigation or even municipal use.

And the question is those are not probably going to qualify as wholly upland. Parts of them may cross uplands, but where they divert and where they use water are not going to be in uplands. They are going to be in lowlands, and that is the question that we have, the effect on ditches defined as wholly upland.

We do not have many of those that are of concern. It is the other thousands of miles of ditches.

Mr. LAMALFA. OK. My time is up, sir, but thank you again. Again, me and my beer drinking, grain growing friends are going to be very interested in how this comes out. I think it needs to be withdrawn because this is really a shot across the bow of all of us in the West.

Thank you, Mr. Chairman.

Mr. MCCLINTOCK. Mr. Costa.

Mr. COSTA. Thank you very much, Mr. Chairman.

I think this subcommittee's focus today on this area is important, and I think that the questions and the comments by my colleagues really point out the frustration and the concern as these proposed regulations are being considered and what will occur if they are implemented while our worst case fears come home.

Mr. Martin, in your written testimony you cite the numerous regulations that are currently out for public comment. You noted seven different rules that could have a significant impact on water users and providers, three of which are directly related to the implementation of the Endangered Species Act, which has been very problematic as you may know in California as it relates to the operations of both our Federal and state water projects that have added to a Mother Nature drought to a manmade regulated drought that has exacerbated the circumstance.

On May 1, 2014, I along with many of my colleagues sent a letter to Administrator McCarthy and Secretary McHugh requesting that the Clean Water Act rule be returned to the Agencies until scientific basis for the rule is complete.

Mr. Chairman, we have over a majority of the House of Representatives on a bipartisan basis that have signed this letter. I would like to submit it for the record.

Mr. MCCLINTOCK. Without objection.

[The letter to Administrator McCarthy and Secretary McHugh dated May 1, 2014 presented by Mr. Costa follows:]

CONGRESS OF THE UNITED STATES,
WASHINGTON, DC,
MAY 1, 2014.

Hon. GINA MCCARTHY, *Administrator*,
U.S. Environmental Protection Agency,
1200 Pennsylvania Avenue, NW,
Washington, DC 20460.

Hon. JOHN M. MCHUGH, *Secretary*,
Department of the Army,
The Pentagon, Room 3E700,
Washington, DC 20310.

DEAR ADMINISTRATOR MCCARTHY AND SECRETARY MCHUGH:

We write to express our serious concerns with the proposed rule re-defining the scope of Federal power under the Clean Water Act (CWA) and ask you to return this rule to your Agencies in order to address the legal, economic, and scientific deficiencies of the proposal.

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) released a proposed rule that would assert CWA jurisdiction over nearly all areas with any hydrologic connection to downstream navigable waters, including man-made conveyances such as ditches. Contrary to your agencies' claims, this would directly contradict prior U.S. Supreme Court decisions, which imposed limits on the extent of Federal CWA authority. Although your agencies have maintained that the rule is narrow and clarifies CWA jurisdiction, it in fact aggressively expands Federal authority under the CWA while bypassing Congress and creating unnecessary ambiguity. Moreover, the rule is based on incomplete scientific and economic analyses.

The rule is flawed in a number of ways. The most problematic of these flaws concerns the significant expansion of areas defined as "waters of the U.S." by effectively removing the word "navigable" from the definition of the CWA. Based on a legally and scientifically unsound view of the "significant nexus" concept espoused by Justice Kennedy, the rule would place features such as ditches, ephemeral drainages, ponds (natural or man-made), prairie potholes, seeps, flood plains, and other occasionally or seasonally wet areas under Federal control.

Additionally, rather than providing clarity and making identifying covered waters "less complicated and more efficient," the rule instead creates more confusion and will inevitably cause unnecessary litigation. For example, the rule heavily relies on undefined or vague concepts such as "riparian areas," "landscape unit," "floodplain," "ordinary high water mark" as determined by the agencies' "best professional judgment" and "aggregation." Even more egregious, the rule throws into confusion extensive state regulation of point sources under various CWA programs.

In early December of 2013, your agencies released a joint analysis stating that this rule would subject an additional 3 percent of U.S. waters and wetlands to CWA jurisdiction and that the rule would create an economic benefit of at least $100 million annually. This calculation is seriously flawed. In this analysis, the EPA evaluated the fiscal year 2009–2010 requests for jurisdictional determinations—a period of time that was the most economically depressed in nearly a century. This period, for example, saw extremely low construction activity and should not have been used as a baseline to estimate the incremental acreage impacted by this rule. In addition, the derivation of the 3 percent increase calculation did not take into account the landowners who—often at no fault of their own—do not seek a jurisdictional determination, but rather later learn from your agencies that their property is subject to the CWA. These errors alone, which are just two of many in EPA's assumptions and methodology, call into question the veracity of any of the conclusions of the economic analysis.

Compounding both the ambiguity of the rule and the highly questionable economic analysis, the scientific report—which the agencies point to as the foundation of this rule—has been neither peer-reviewed nor finalized. The EPA's draft study, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," was sent to the EPA's Science Advisory Board to begin review on the same day the rule was sent to OMB for interagency review. The science should always come before a rulemaking, especially in this instance where the scientific and legal concepts are inextricably linked.

For all these reasons, we ask that this rule be withdrawn and returned to your agencies. This rule has been built on an incomplete scientific study and a flawed

economic analysis. We therefore ask you to formally return this rule to your agencies.

Sincerely,

CHRIS COLLINS,
KURT SCHRADER,
BILL SHUSTER,
LAMAR SMITH,
FRED UPTON,
DOC HASTINGS,
FRANK LUCAS,
COLLIN PETERSON,
HAL ROGERS,
SAM GRAVES,
BOB GOODLATTE,
DAVE CAMP,
DARRELL ISSA,
JOHN KLINE
PETE SESSIONS,
JEB HENSARLING,
JEFF MILLER,
CANDICE MILLER,
MIKE ROGERS,
BOB GIBBS,
MIKE MCCAUL,
PAUL RYAN,
Members of Congress.

Mr. COSTA. And we hope that an answer will be forthcoming.

We also understand that the rule, the EPA and the Corps have relied on what they call a draft synthesis which is currently under review by the Scientific Advisory Board of more than 1,000 published, peer-reviewed scientific reports. In the preamble of the proposed rule, the Agencies state that the rule will not be finalized until the Scientific Advisory Board review and final report are complete.

Many of us in California as a result and also the Western States are concerned that the regulated community has expressed serious concerns about the final report not being available in time for public comment on the period of the rule.

A couple of questions, Mr. Martin. Do you believe that the scientific basis for the rulemaking should be available for review prior to the rulemaking process being initiated?

Mr. MARTIN. No question, Congressman.

Mr. COSTA. OK.

Mr. MARTIN. These are very complex rules, and if they are still in draft form, the underlying basis for that, it is very difficult to read these rules.

Mr. COSTA. And what are the challenges to the regulated community if the scientific basis for the rule is also in a draft form during the public comment period on the rule?

Mr. MARTIN. That's correct.

Mr. COSTA. Therein lies the whole purpose of why we are trying to call time out, in essence, to get an understanding because the potential implications of this rulemaking is far and wide, and I for one am very fearful of the law of unintended consequences, and maybe that was not the intent, but the regulatory framework and the challenges that we have had in California just as an example,

in the last decade in the use of best science because a question as new science becomes available and as other factors are considered in terms of the contributions to the impacts of the waterways we are trying to deal with.

So I am very concerned. The Environmental Protection Agency needs to, I think, sit down and provide an opportunity for those who are potentially to be regulated, an opportunity to understand the breadth and width and scope of what these proposed regulations will do, and that is not happening as far as I can tell.

Do you care to comment?

Mr. MARTIN. We agree completely with that, Congressman.

Mr. COSTA. Would any of the other witnesses care to comment?

Mr. LEMLEY. I would like to. Thank you for a brief minute here.

Obviously there needs to be clarity in the regulation, which is exactly why I think we are talking about a proposed comment. The comment period is open until October, I believe, and I just do not want us to sit here and think like the rule has already been accomplished, when there is time for a back-and-forth with the Agency.

Mr. COSTA. Mr. Chairman, I do not know if it is appropriate, but certainly I think it ought to be under consideration for a potential subcommittee hearing to allow those in California to testify on this proposed rule and where we might be able to make a difference.

I mean, this comes up time and time again about the potential impacts and the fears and the concerns, given the whole nature of what has taken place over the last just 8 years in California.

My time has expired. I want to thank the members of the subcommittee and the witnesses for your testimony and look forward to continuing to work on this important issue.

Mr. MCCLINTOCK. Thank you.

Ms. Lummis.

Mrs. LUMMIS. Well, thank you, Mr. Chairman.

I want to thank Pat Tyrrell, our Wyoming State Engineer, for testifying today.

There really is no position more important in the State of Wyoming than the State Engineer, and Mr. Tyrrell comes from a long line of highly qualified advocates for Wyoming water, for state regulation, and his work with state engineers throughout the West has made for very cooperative relationships, and the work that Western state engineers do on working with each other on water issues, trying to resolve them before they reach the courts, has been extraordinary.

And they can even be resolved in the courts if necessary. Hence our concern, that now the Federal Government is weighing in in areas where they have never weighed in before, and bringing this issue through Federal rulemaking is something that states just find contemptible.

Here is an example, and now I would like to start asking my questions. Mr. Tyrrell, in Wyoming, is it not true that surface water and groundwater are regulated separately unless studies confirm that they are so connected as to constitute one source of supply?

Mr. TYRRELL. Mr. Chairman and Representative Lummis, yes, that is correct.

Mrs. LUMMIS. Now, does the Forest Service reverse this presumption and presume interconnectivity unless proven otherwise?

Mr. TYRRELL. Yes, they do in their Directive, proposed Directive.

Mrs. LUMMIS. Now, can you explain the significance of that Directive and what that would do and how it might impact water rights holders in Wyoming and elsewhere in the West?

Mr. TYRRELL. The concern that I have is the connection to surface water might then lead to regulatory effects in the surface water regime. Another part of the proposed Directive I failed to mention a minute ago is their reach onto adjacent lands which are not Forest lands. My concern there might be a water proposal, a permit application into my office off the Forest that would purport or propose to produce groundwater or build a stock dam or some other water feature that might then be challenged because of a connection to groundwater on the Forest, a presumed connection.

So the cost of disproving that connection would fall to the applicant.

Mrs. LUMMIS. In order to do your job effectively as State Engineer, how important is it that the Forest Service play by the same rules as any other land owner or water user in the state?

Mr. TYRRELL. It is vitally important, and it is part of the reason we entered an MOU with them just 2 years ago. The Forest uses water through their own uses at campground and offices and for their own rights, and they get water rights from the State of Wyoming to do that.

We also have private permittees on the Forest that get permits in their name, and they have to be able to exercise those water rights. It is vitally important to be able to access that water whether you are an allottee or the Forest itself.

Mrs. LUMMIS. Can you walk us through how the Forest Service Directive intrudes on state water rights and contradicts the MOU that you currently have with the Forest Service?

Mr. TYRRELL. The primary concern I have with contradiction with state water rights, and I have mentioned this already, is the proposed assertion of reserve rights. As relates to the MOU, we negotiated that MOU to clarify our permitting process when either private or Forest permit applications for water rights come into my office. That MOU says nothing about reserve rights to groundwater. That MOU says nothing about the Forest Service commenting on applications on adjacent lands.

The MOU has a 30-day window for Forest comments on applications by non-Forest applicants. The Directive has no review period and no standard of review.

The MOU says the Forest will receive a courtesy notice for time limited permits. The Directive does not mention time limited permits.

And finally, the MOU says nothing about that hydrologic connection or any review thereof for permit applications.

Mrs. LUMMIS. With all the different ways the EPA can find water to be jurisdictional under the proposed rule, can you think of a water body that would not be under the Federal proposed rule?

Mr. TYRRELL. Off the top of my head, Representative Lummis, I cannot.

Mrs. LUMMIS. What about the exemptions? Do they help?

Mr. TYRRELL. The exemptions, I think, and we have talked about this, are more confusing than they were under previous guidance. We have gone from maybe 25 exemptions to an interpretive rule of over 100, and I think we still find the analysis on the ground will be case by case.

Mrs. LUMMIS. Thank you.

Mr. Chairman, I may have to leave because oddly, we are having a simultaneous hearing in the Science, Space and Technology Committee on the use of secret science. I am trying to get a handle on the use of secret science by the Federal Government. That seems to be a pattern that we are seeing now with regard to Federal agencies.

So the cross-pollination of what is happening in science right now and in this committee is a serious concern and is a commonly held problem.

Thank you for holding this hearing, Mr. Chairman. I yield back.

Mr. MCCLINTOCK. Thank you.

We have just been joined by Mr. Labrador. If you would like a few minutes, we are going to go to a second round or you can be recognized now or both.

Mr. LABRADOR. I will just ask a couple of questions. Thank you, Mr. Chairman.

Mr. Martin, you state in your written testimony that the National Water Resources Association and other water users are currently reviewing no less than seven Agency rules currently out for comment that have the potential to seriously impact water users. Many of these rules are so complex it is almost impossible to understand and review each rule because of their heavy volume.

In your experience, are Agencies interested in an open and transparent process that includes input from the water users?

Mr. MARTIN. Well, as stated earlier, the Forest Service groundwater rule was done in a vacuum. It was not done with any sort of input to our knowledge, and we are some of the biggest water users and rely on water within the Forest Service.

It is difficult. These rules are hundreds of pages long, and to get through them in the short period of time is a very difficult process.

Mr. LABRADOR. So the EPA and the U.S. Army Corps of Engineers claim the proposed rule clarifying the "Waters of the United States" under the Clean Water Act will not expand Federal jurisdiction. Can you give some examples and possibilities of how that proposed rule will, indeed, expand the EPA and Corps authority over millions of acres?

Mr. MARTIN. I believe even the EPA and Corps have determined that there will be an expansion of jurisdiction. The question is just how much, and for the people I represent our biggest concerns are ditches, canals, artificial conveyances that on the surface appear to be excluded, but if you look behind the terms in the rule itself, it looks like it may be back-included.

Mr. LABRADOR. OK. The EPA and Corps released the proposed rule in an effort to clarify protection under the Clean Water Act for streams and wetlands. However, the proposed rule has raised numerous questions about definitions in the rule and how they impact the irrigators, water companies, and other water users.

What are some of the areas in the rule that lack clear definitions and require further clarification?

And I would like all of you to answer that question as well, but we start with you, Mr. Tyrrell.

Mr. MARTIN. I will start right off and just right off the surface it is ditches and artificial conveyances and what is in uplands. Those are two of the biggest issues for my clients.

Mr. LABRADOR. OK.

Mr. TYRRELL. I would agree with those. I think you have the tributary definition that may be expansive, the upland question, and the shallow subsurface water, which in our lexicon would be groundwater.

Mr. LEMLEY. Well, of course, I am not the water expert, but I'm sorry. Would you repeat the question please?

Mr. LABRADOR. Yes, absolutely. So what are some of the areas in the rule that lack clear definitions and require further clarification?

Mr. LEMLEY. Well, I think we are hearing that from the other witnesses today, and I think that this is a comment period at which time they can ask EPA for that clarification.

Mr. LABRADOR. OK.

Mr. PARKER. And from a farming and ranching standpoint, you in Idaho understand this very well. We do a lot of diversion of streams and irrigation and do flood irrigation across farms and then return flow because somebody has a downstream right to that water.

I met with Region 8 EPA 2 weeks ago, and I asked about the exemption on return flows, and if that water runs across the farm, is delivered into an irrigation ditch and then returned to the stream—the Region 8 EPA expressed an interest in that now becoming a point source of pollution, and that changes the whole dynamic, Representative.

Mr. LABRADOR. Thank you.

Mr. Clark, what are your thoughts?

Mr. CLARK. Well, I think it is easiest to point to and we have mentioned the upland definition. I think my biggest concern is even if you can clarify a definition is getting a consistent application of those tasks with enforcing what may appear to be clear, but often is not consistent.

Mr. LABRADOR. OK. Thank you, Mr. Chairman. I yield back my time.

Mr. MCCLINTOCK. Thank you.

We are going to go to a quick second round and mainly because I feel the need to correct the record on a number of items. My colleague from California, Mr. Huffman, charges that the House itself overruled state water rights laws in the Nunes legislation of the last Congress and most recently in the Valadao legislation.

I have had to correct him before on this. I feel compelled to correct him again. That legislation specifically reinforced state water rights law as it applied to joint Federal and state operation of the Central Valley Project. It required the State of California to obey its own water rights laws. They had authority that clearly exists under the contracts clause of Article 1 of the Constitution, the

takings clause of the Fifth Amendment and the privileges and immunities clause of the 14th Amendment.

The Northern California Water Association, speaking as an umbrella group for all of the water districts in northern California wrote in reference to this provision, "the bill if enacted would provide an unprecedented Federal statutory express recognition of and commitment to California State water rights priority system and area of origin protections."

That is exactly the opposite of what these EPA and U.S. Forest Service regulations would do.

I also want to make it clear that the Bureau of Reclamation was invited to this hearing to testify on how it would implement the EPA's rule, and the U.S. Forest Service was invited to testify to discuss its proposed rule. Both declined the committee's invitation.

Finally, Mr. Lemley, you have given testimony involving the entire brewing industry. Are you testifying on behalf of any association of brewers or other trade association, or are you just here representing your own company?

Mr. LEMLEY. That is correct, Mr. Chairman. I was simply citing the statistics from the Brewers——

Mr. MCCLINTOCK. So you are only representing your own company, not the brewing industry or any trade associations?

Mr. LEMLEY. I am here on behalf of New Belgium Brewing Company, yes, sir.

Mr. MCCLINTOCK. OK. Mr. Parker, Mr. Huffman alleges that these uncertainties that many of you have testified to are simply speculative, and they are denied by the administration. Are you satisfied by these assurances?

Mr. PARKER. I do not think they are speculative at all when you think of the groups that are out there looking for opportunities to establish, sue and settle opportunities or to attack farmers and ranchers for various practices.

Mr. MCCLINTOCK. So it is not only the bureaucrats that you have to worry about giving often wildly different interpretations. You also have to worry about being sued by every third party interest group?

Mr. PARKER. That is exactly what it opens up, and we have Western Watershed, one of those wonderful groups out of Idaho that is down in Utah suing and settling and suing and harming our industry down there, grazers or whatever, and, yes, it opens the door much wider, Mr. Chairman.

Mr. MCCLINTOCK. And, by the way, these rules would be interpreted by the individual managers in the field, not by whoever was testifying to the T&I Committee.

Mr. PARKER. In fact, the Forest Service directive says that it is the line employees that make those decisions.

Mr. MCCLINTOCK. Mr. Martin, Mr. Tyrrell, are either of you, Mr. Clark; are any of you satisfied with these assurances?

Mr. MARTIN. No, Mr. Chairman.

Mr. CLARK. No, sir.

Mr. MCCLINTOCK. Mr. Parker, I mentioned earlier in my questioning of Mr. Martin the circumstances that exist throughout the Sierra, you know, many, many properties that have ditches run-

ning through them that run into gullies, that run into streams, that run either into a navigable river or onto Forest Service land.

Would these properties come under the jurisdiction of the EPA and the U.S. Forest Service if they attempted to do anything affecting the ditch, for example, grading a driveway that passed over that ditch?

Mr. PARKER. I believe so, and when you look at a state like Utah and I think Idaho is in a similar circumstance, we have in excess of 70 percent of the water that we rely on annually that is deposited in snow or rain on the Forest system lands, and it is delivered to communities, has been for 150 years, and I think this explicitly goes into that area.

Mr. MCCLINTOCK. So right now that individual just has to get a grading permit from the county. Under this law they would then have to go through the EPA and presumably the U.S. Forest Service in order to get permission to make a simple modification on their property?

Mr. PARKER. I think that is the case. In Wyoming, there was a pond built near where I ranched as a young boy up in the Bridger Valley that they went through all of the state permitting that was necessary, built the pond, and now they are under some kind of duress from the EPA for building that and affecting a wetland.

Mr. MCCLINTOCK. OK. Thank you.

Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you.

Mr. Lemley, you were asked a question that you were not finished giving an answer. Would you like to elaborate how the proposed rule helps to clarify the uncertainty that resulted from the Supreme Court's decision?

Mr. LEMLEY. Yes. Thank you.

I mean, I believe that this is the way that the government operates, is that a regulatory agency looks to do its very best for the people of the country, and whether that is something new or in this case something that seems to restore protections that were previously there, that is the agency's rule.

And so I believe that this hearing is good, and that the comment period will continue to be good as we all express our concerns, those who have them, to the EPA for how the rule will be carried out, but I do not believe that the EPA is challenging the Supreme Court.

Mrs. NAPOLITANO. Thank you.

Mr. Tyrrell, you are aware that under a 2008 Bush guidance shallow subsurface connections between water bodies would be sufficient to demonstrate Clean Water Act jurisdiction. Yet when asked about the groundwater subsurface connection, EPA Deputy Director Preshevski, stated 2 weeks ago that "excluded from the proposed rule is groundwater, including groundwater drained through subsurface drainage systems."

Would you advocate that any subsurface connection be eliminated under any circumstances?

Mr. TYRRELL. Mr. Chairman, Representative Napolitano, I just want to understand, I guess, what the groundwater exemption means. We know that there is a groundwater exemption. I do not know, because the Science Advisory Report is still not finalized and

the draft rule is out, what the shallow groundwater connection means from a regulatory standpoint.

If you would like, I can get additional depth to that answer from our DEQ when I get home.

Mrs. NAPOLITANO. If you would provide it to the subcommittee we would be very grateful, sir.

Mr. TYRRELL. Thank you.

Mrs. NAPOLITANO. And then to all of the panel, do you think the status quo is acceptable? The status quo, would the status quo be acceptable, in other words, no changes?

Mr. PARKER. From an agricultural standpoint and a federalism-state's rights standpoint, leave this up to the states. The Forest Service and other land management agencies need to allow the states to step out and do the jobs that they have under the state regulations to manage these waters, to protect the waters, to protect recharge zones.

The state already has that in place. The Federal Agencies need to allow them to do that on the public lands.

Mrs. NAPOLITANO. Anybody else?

Mr. TYRRELL. I believe that the status quo is not acceptable in this case because I do think we need additional clarity in things such as "Waters of the U.S.," but I do not think the instrument in front of us provides that clarity.

Mr. LEMLEY. Obviously I believe the status quo is not adequate, and that headwaters, ephemeral streams and wetlands require these additional protections by the EPA to make sure that we all have clean water to do farming, to do ranching, and to run our businesses.

Mr. CLARK. And maybe last, it might be naive. I know for where we are, through trial and error we work well with the Corps. We work well with the other Agencies in applying the Clean Water Act as it is today. I see that the existing is sufficient.

Mr. MARTIN. It would be best if we could have a bright line test that would provide clarity to everybody who is on the ground. Unfortunately, I do not think this rule provides it.

Mrs. NAPOLITANO. Well, I am hearing from most of you that you need more clarity.

Are you participating? Are any of you participating in the rule-making process and will you be submitting the documents recommending detailed improvements to the definition of "Waters of the United States"?

Mr. MARTIN. Yes. Natural Water Resources Association will be submitting comments.

Mr. TYRRELL. The State of Wyoming will comment.

Mr. PARKER. The American Farm Bureau will be and has been.

Mr. CLARK. Both individually and through our national organization, yes, ma'am.

Mrs. NAPOLITANO. Thank you, gentlemen.

Sir, Mr. Lemley?

Thank you very much.

My concern, and I do not have any farm community at all, but I am very concerned about the contamination of water for the drinking water for farm use, for industrial use, for all the uses. So to me the clean waters needs to apply to everybody, and being able

to ensure that our general public, the owners of the water which are the people of the United States, not necessarily all the states but the people that reside within those states, are affected by our non-activity or by ignoring some of the contamination that has been polluting some of our streams and waters.

And I look forward to working with you. Thank you very much, Mr. Chair.

Mr. MCCLINTOCK. Thank you.

I would like to thank our witnesses for their valuable testimony.

Members of the subcommittee may have additional questions for witnesses, and we would ask that you respond to those in writing. The hearing record will be open for 10 business days to receive those responses.

And if there is no further business, without objection, the subcommittee stands adjourned.

[Whereupon, at 12:01 p.m., the subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

PREPARED STATEMENT OF U.S. DEPARTMENT OF AGRICULTURE

Chairman McClintock, Ranking Member Napolitano, and members of the subcommittee, thank you for the opportunity to provide perspective on the role of the U.S. Department of Agriculture (USDA) in the stewardship of water resources on the National Forest System (NFS). The Department recognizes the importance of water in the NFS for resource stewardship, domestic use and public recreation.

All of the efforts of the USDA Forest Service (Forest Service) regarding the management of water resources are conducted to ensure that abundant clean water is available for the public's use and enjoyment. Whether it is to create snow for downhill skiing, provide for world class fishing experiences, sustain wildlife and domestic animals, or to maintain community water supplies, everything is done for the public's interest.

The Organic Administration Act (of June 4, 1897 as amended) and the Multiple Use Sustained Yield Act, which designated and defined the purposes of the National Forests recognize water as one of the primary purposes for national forest designation. Today, water from national forests contributes to the economic and ecological vitality of communities across the Nation and plays a critical role in supplying Americans with clean drinking water. National forests alone provide 18 percent of the Nation's water, and over half the water in the West.[1] Several current initiatives highlight our role in protecting and enhancing water resources on behalf of the public and communities we serve, including the first national Watershed Condition Framework, publishing a new National Land Management Planning Rule that emphasizes water stewardship, implementing a National Climate Change Roadmap and Scorecard and investing in national assessments like the Forests to Faucets project.

The Forest Service recently published for public comment, a proposed directive to ensure that the Forest Service's decisions and activities undertaken within its existing authorities on NFS lands, evaluate and address groundwater resources. Groundwater is considered all water below the ground surface and is a key component of the hydrologic cycle—the continuous movement of water on, above, and below the surface of the Earth. Serving as a reservoir, groundwater supplies cold, clean water to springs, streams, and wetlands, as well as water for human uses. NFS lands provide sources of drinking water for people in 42 states and the Commonwealth of Puerto Rico,[2] there is a clear need for the Forest Service—in cooperation with the states—to take an active role in analyzing, evaluating, and monitoring groundwater resources in the National Forest System.

The directive would set policy for Forest Service decisions and activities that involve or potentially impact groundwater resources on NFS lands, and would improve the Forest Service's ability to analyze and monitor potential uses of NFS land that

[1] www.fs.fed.us/pnw/pubs/pnw_gtr812.pdf.
[2] 79 Fed. Reg. 25815.

could affect groundwater resources. The directive will also create a cohesive framework to respond to groundwater development proposals, and will provide enhanced certainty and predictability to our state partners and project proponents.

By both executive action and legislation NFS lands were set aside or acquired in part to protect and conserve water resources. The Forest Service, along with most states, considers surface water and groundwater to be connected and interdependent resources. The proposed directive would establish policy for managing surface uses with the understanding that surface water and groundwater are interconnected. The Forest Service recognizes the states' roles in managing water resources and administering water rights within their borders. Nothing in the proposed directive would affect states' role in the management of water rights.

The Forest Service is seeing increased interest and demands from the public to address access to and protection of groundwater as part of the decisions and activities the agency performs. This has been particularly true with respect to oil and gas and minerals development. Recent examples include lawsuits in the states of Idaho and Oregon claiming that the Forest Service conducted inadequate analysis of the potential impacts to groundwater from such activities.

Public demands with respect to groundwater show there is a clear need to establish national policy to demonstrate to the public how the Forest Service will address groundwater as part of its land management duties, specifically that the Agency analyzes potential effects on groundwater from proposed activities, and will institute protective measures within the rights of a proponent. The Forest Service has an obligation to analyze proposed development and protect resources, including groundwater.

The proposed directive would establish goals and clarify responsibilities for groundwater resource management at each level of the Forest Service. It would also provide transparent and consistent direction for evaluating proposed Forest Service activities and special uses of groundwater resources on NFS lands and for measuring major groundwater withdrawals.

The Forest Service expects that implementing the proposed directive would raise the level of awareness of the importance of groundwater resources for NFS lands. This would assist with the development of an inventory of the groundwater-dependent ecosystems on NFS lands.

Through this proposed directive, the Forest Service could more readily respond to changing conditions (such as drought, climate change, land use changes, needs for additional water supplies) in an informed manner, while sustaining the health and productivity of NFS lands and meeting new demands in a responsible way. The proposed policy was published in the Federal Register for public notice and comment on May 6, 2014 with a 90-day public comment period and a 120-day tribal consultation period.

Just this week, the Forest Service also published a proposal that balances the interests of the public, the ski areas and our natural resources by ensuring that the necessary water is provided for winter recreation through our special-use permitting process. The Forest Service's interest on behalf of the public is to protect the availability of water dedicated to ski area operations on National Forest System lands. Ski resorts build chair lifts and other related facilities and modify the landscape to accommodate ski runs, and are often located on lands managed by the agency. These capital improvements are approved based on a determination that sufficient water is available to operate them. Therefore, it is essential that sufficient water remain committed to the activities authorized under a ski area permit.

Ski areas, which cover approximately 180,000 acres of national forest system lands, average 23 million visits annually. Those visits contribute $3 billion every winter in direct spending to local economies and create approximately 80,000 full, part-time and seasonal jobs in rural communities.

The draft proposal addresses water provided for ski areas on NFS lands through the permitting process. The proposal will help ensure public winter recreation opportunities remain available in the long term on Federal lands.

The Forest Service values the input of states, tribes and all stakeholders and looks forward to receiving input on both of these important proposals that are currently out for public comment. This concludes our statement for the record.

PREPARED STATEMENT OF BUREAU OF RECLAMATION, U.S. DEPARTMENT OF THE INTERIOR

The Bureau of Reclamation (Reclamation) submits the following statement in response to the subcommittee's hearing titled "New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs." We recognize the subcommittee's interest in assuring that Federal regulations do not adversely impact our environment and economy, and we welcome the opportunity to help foster a clear understanding of the recently proposed rule under the Clean Water Act (Act) and its potential impacts on Bureau of Reclamation activities.

On April 21, 2014, the Federal Register published the proposed rule from the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps)[1] that is the subject of today's hearing. Titled the "Definition of 'Waters of the United States' Under the Clean Water Act," the proposed rule responds to widespread and longstanding uncertainty about the scope of waters regulated under the Act. As stated in the materials accompanying the proposed rule's release, Members of Congress, state and local officials, industry, agriculture, environmental groups, and the public have asked for nearly a decade that a rulemaking occur to provide clarity on the scope of Federal jurisdiction under the Act.

While we will leave it to EPA and the Corps to discuss the details of the proposed rule, it is our understanding that the proposed rule is not designed to expand the Act's applicability beyond existing regulation; that it is not designed to cover groundwater; and that the rule does not expand the Act's reach to cover additional irrigation ditches or alter the existing water transfers exclusion, which are obviously of special relevance for Reclamation. For the purposes of Reclamation's water and power mission areas that are of interest to this subcommittee, Reclamation shares the interest of our stakeholders in preserving our shared ability to operate and maintain facilities and deliver water and power. To that end, we are pleased that EPA and the Corps, for the first time, have included a proposed exclusion in the rule for ditches excavated wholly in uplands and draining only uplands, with less than perennial flow, including those that may carry groundwater. The significance of this detail is that ditches excavated for drainage purposes in uplands on agricultural lands are unlikely to serve their intended function unless they carry flow at least intermittently, so it is important that ditches with intermittent flow be eligible for the proposed exemption.

We are encouraged that the EPA and Corps are working with state and tribal partners to assure these voices are effectively represented during this rulemaking process. We appreciate EPA and the Corps' efforts to improve clarity and preserve existing Clean Water Act exemptions and exclusions for agriculture. We also appreciate that the rule does not change, in any way, existing Clean Water Act exemptions from permitting for discharges of dredged and/or fill material in waters of the United States associated with agriculture, ranching and forestry activities, including exemptions for normal farming, silviculture, and ranching practices; upland soil and water conservation practices; agricultural stormwater discharges; return flows from irrigated agriculture; construction and maintenance of farm or stock ponds or irrigation ditches; maintenance of drainage ditches; and construction or maintenance of farm, forest, and temporary mining roads, where constructed and maintained in accordance with best management practices.

As the members of this subcommittee know, EPA and the Corps have announced plans to accept public comment on the proposed rule through October 20 of this year. The Clean Water Act is over four decades old, with several instances of litigation over Congress's true intentions in passing the law, and we recognize the value in updated regulations to guide its implementation. Reclamation shares the interest of our stakeholders in preserving our shared ability to operate and maintain facilities and deliver water and power. As with the proposed rule, Reclamation will continue to participate in the interagency process in support of our collective interests, as the services work to finalize the rule.

Thank you for the opportunity to participate in today's hearing.

[1] http://www2.epa.gov/sites/production/files/2014-04/documents/fr-2014-07142.pdf.

PREPARED STATEMENT OF DAN KEPPEN, EXECUTIVE DIRECTOR, FAMILY FARM ALLIANCE, KLAMATH FALLS, OREGON

Thank you for this opportunity for the Family Farm Alliance (Alliance) to submit comments to your subcommittee on this important matter. The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts and allied industries in 16 western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to western farmers and ranchers. The Alliance has long advocated that solutions to conflicts over the allocation and use of water resources must begin with recognition of the traditional deference to state water allocation systems. Federal agencies must recognize and respect state-based water rights and develop their management decisions according to state law and abide by state decrees defining both Federal and non-Federal rights. Federal agencies need to work within the framework of existing prior appropriation systems instead of attempting to fashion solutions which circumvent current water rights allocation and administration schemes.

Our comments summarize concerns the Alliance has with proposals put forward by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers ("Waters of the U.S." rule) and the U.S. Forest Service (groundwater management directive). Each of these issues is dealt with at length, below.

"WATERS OF THE U.S." RULE

The Alliance membership includes many irrigation districts, water companies, and farmers and ranchers in 16 western states, with many served by Bureau of Reclamation (Reclamation) owned facilities. The Alliance in 2013 commissioned a study of the economic benefits to the Nation from western irrigated agriculture, calculating that the total direct and indirect production value for the 17 states comprising the western U.S. region was around $156 billion annually, of which $117 billion was tied to crops produced on about 42 million irrigated acres in the western United States.[1] Without irrigation, these lands would not yield the billions of dollars in economic benefits for the region and the Nation, let alone the vast amounts of quality food and fiber enjoyed every single day by the American public. And, since World War II, the percentage contribution of (disposable) household income to food costs has dropped from 25 percent to around 7 percent, allowing for the continued growth of our consumer spending economy.[2] Thus, the importance of western irrigated agriculture to the Nation is well documented.

On April 21, 2014 the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) announced a proposed rulemaking under the Federal Clean Water Act (CWA) redefining the agencies' jurisdiction over water bodies. The proposed rule is a complicated set of regulatory definitions, including new ambiguously defined terms, that seeks to "clarify" the authority of these two agencies to regulate "navigable waters" which are defined in the CWA as the "Waters of the U.S." (WOTUS).

In the Alliance' view, the proposal, if adopted, would not clarify the agencies' jurisdictional determinations over WOTUS. In fact, it would significantly expand the scope of waters protected under the Federal CWA beyond those waters currently regulated by asserting jurisdiction over waters, including many ditches, conveyances, isolated waters and other waters, resulting in many negative economic and societal impacts to irrigated agriculture in the West.

The proposed rule asserts that most waters categorically have a "significant nexus" to traditional navigable waters currently regulated under the CWA, and yet allows the EPA or the Corps to establish a "significant nexus" on a case-by-case basis over other waters. The criteria for establishing a significant nexus is ambiguous and could be easily applied to most waters (i.e. "more than speculative or insubstantial effect . . ."), and would increase Federal control over most waters and any land activities that might impact these waters, subjecting these lands and waters to more complicated and layered reviews and potential third party citizen lawsuits.

The proposed rule would change all sections of the CWA: Sections 303, 304, 305 (state Water Quality standards), 311 (oil spill prevention), 401 (state Water Quality certification) 402 (effluent/stormwater discharge permits) and 404 (dredge and fill permits). At a minimum, the proposed rule will require substantial state resources to administer, including issuance of all the additional permits, newly developed/

[1] "The Economic Importance of Western Irrigated Agriculture" Water Resources—White Paper, prepared by Pacific Northwest Project for the Family Farm Alliance and the Irrigation Association, August 2013.

[2] *Id.*

revised water quality standards, and total maximum daily loads (TMDLs) required by the expanded jurisdiction. Third party (citizen) actions will also almost certainly precipitate litigation, leading to these required Federal and state administrative actions and further delays in project implementation.

Under the proposal, all tributaries, newly defined as including a bed, banks and an ordinary high water mark, and including any waters such as wetlands, lakes, and ponds that contribute flow, either directly or indirectly through another water body, to downstream traditional navigable waters or interstate waters would be jurisdictional. All waters adjacent to such tributaries would now be jurisdictional, broadly defined as waters within floodplains and riparian areas of otherwise jurisdictional waters, and including subsurface hydrologic connection or confined surface hydrologic connection to a jurisdictional water. And all man-made conveyances, including ditches, would be considered jurisdictional tributaries if they meet the new definition, regardless of perennial, intermittent, or ephemeral flow.

Under the proposed rule, many private land and water conservation projects designed to benefit watersheds, waterfowl and riparian habitats may be subject to CWA permitting, acting as a disincentive to such important projects. While the EPA and the Corps emphatically deny projects like erosion control or soil stabilization work are exempt from permitting under the proposed rule, this would not stop third parties from raising the jurisdictional question in litigation, creating the uncertainty and instability resource users fear the most. There is nothing "clear" about this rule proposed to "clarify" CWA jurisdiction over "Waters of the U.S.", only the uncertainty created by using ambiguous definitions and convoluted analyses to define what is jurisdiction and what is not. In its haste to get the proposed rule out for comment, the EPA has out run the analysis of its own underlying scientific documentation, the draft EPA *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, which is still under agency and Science Advisory Board (SAB) review.

The proposed rule has huge implications for irrigated agriculture in the West. Under the proposal, third parties could assert that features such as irrigation and drainage ditches, stormwater ditches, and water storage or treatment ponds and reservoirs would now become jurisdictional waters, and place the burden of proof on irrigation water purveyors, farmers and ranchers to prove they are exempt from CWA jurisdiction. Irrigation water suppliers and private and public landowners will experience increased costs and delays associated with the additional permitting requirements, restrictions on land use options, and the continued uncertainty on the scope of CWA jurisdiction under the proposal.

The costs associated with permitting under the CWA are astronomical and time consuming, with permitting taking hundreds of days to complete (on average) and with permitting costs ranging from the tens of thousands to the hundreds of thousands of dollars. These costs cannot be avoided, because the Clean Water Act imposes criminal liability, as well as escalating civil fines, on a broad range of everyday activities. Expanding the scope of the CWA to additional and uncertain jurisdictional water bodies will only increase those costs and delays as state and Federal regulators will simply not have the resources to keep up with these expanded permit requirements.

The categorical exemptions from jurisdiction under the CWA provided in the proposed rule, while laudable, lack the clarity and specificity needed to provide the certainty irrigated agriculture needs to operate on a daily basis. The Alliance believes the rule needs to provide such clarity that the current exemptions for irrigation ditches, drains and associated facilities will continue to be retained. This important infrastructure is the lifeblood of irrigated agriculture in the West, and the existing distribution system of ditches, canals, drains and diversions work to provide water to thirsty farms and ranches in the most efficient manner possible. If these facilities are not operated and maintained in an efficient and timely manner during critically dry periods during the growing season, the economic and societal result will be devastating to farmers, rural communities and, ultimately, the Nation.

Irrigation ditches are constructed conveyances regularly maintained for the purpose of delivering irrigation water or draining agricultural lands and are distinct from natural waters. These are artificial facilities created for the purpose of irrigation and drainage of irrigated lands from the application of water in the irrigation process. The irrigation ditches and drains carry flows as needed to deliver irrigation water or to drain the agricultural waters from irrigated lands. These man-made canals and ditches would otherwise be dry land, except for the application of irrigation water to produce crops. Where irrigation drains have a more permanent flow, that flow is due to the timing of irrigation water applied to crops and seeping down through the soil until it reaches subsurface perched groundwater or a nonpermeable barrier in the soil profile, where these drains can intercept this irrigation

return flow to carry it away and prevent water buildup in the plant root zone in the field. Permanent flows in drains also can result from these irrigation drains actually picking up flowing groundwater during certain periods of the year, which is exempt from CWA jurisdiction.

Return flows from agriculture are specifically excluded from CWA regulation in the Act, and permits are not required for constructing and maintaining irrigation ditches excavated in dry land and the maintenance of irrigation drains draining those irrigated lands. The Alliance believes that the agencies should make clear in their proposed rulemaking that irrigation canals, ditches and drains are not navigable waters, are not "Waters of the U.S.," and are not "tributary" to WOTUS, and thus are not jurisdictional under the CWA. This was Congress' intent when it passed the CWA, and requires that the proposed rule should include an express exemption for irrigation canals, ditches and drains, from the definition of navigable waters, waters of the United States, and tributary waters.

Irrigation districts, canal companies and other water providers do routine maintenance work in their conveyance facilities every year. In addition, they are required to make more extensive improvements in the form of rehabilitation or replacement of some of the works from time to time. Water conservation activities such as lining or piping canals and drains are also commonplace activities, along with relocating portions of these water conveyance facilities for improved efficiencies. Without the ability to conduct these necessary activities, agricultural water delivery would come to a screeching halt.

The Corps of Engineers has, in certain cases in the past, asserted that these activities are being conducted in "Waters of the United States" and therefore require a Sec. 404 permit or reliance on one of these existing exemptions contained in the Act. As a result, we worked with the Corps, EPA and the Bureau of Reclamation to obtain a Regulatory Guidance Letter (RGL) helping to clarify the scope and breadth of the exemptions contained in the Act as they apply to these activities. We are certainly appreciative of these efforts by the Federal agencies, which culminated with the release of the RGL in 2007. However, the new WOTUS proposal does not clarify whether these canals, ditches and drains are jurisdictional under the CWA as WOTUS, nor is it clear if the proposal provides the same application of the exemptions proffered by the RGL.

Our member districts and water purveyors operate and maintain literally thousands of miles of canals, ditches and drains serving millions of acres of irrigated crop lands. These entities perform routine maintenance work on these conveyance facilities constantly, and at times may improve their facilities by piping or lining ditches and canals to conserve water in the delivery process. If these water providers are required to obtain a CWA permit for each of these routine activities, delivering irrigation water to western farms and ranches would become much more expensive and time consuming, and could make it almost impossible to deliver water in time to irrigate crops.

The Bureau of Reclamation has a vested interest in ensuring that water is delivered efficiently and on a timely basis, as these farms and ranches are tasked with repaying the Federal construction debt on these Federal projects. Water conservation and management improvements have become an important part of the western irrigation landscape today due to the challenges of drought, increased demand, and environmental requirements. Making irrigation ditches and drains jurisdictional under the CWA would hamstring the agency from accomplishing its mission of managing, developing and protecting western water resources in the delivery of water to water contractors.

Finally, the Alliance believes that the proposed rule is inconsistent with congressional intent, the language of the CWA and Supreme Court decisions. The Supreme Court has twice affirmed that Federal jurisdiction under the CWA is limited, rejecting, first, the agencies' broad assertion of CWA jurisdiction based on the use of isolated waters by migratory birds and, second, the agencies' assertion of jurisdiction based on "any hydrological connection". Yet the proposed rule would continue to define CWA jurisdiction as broadly as these previous theories rejected by the Supreme Court.

The administration and Congress have a unique opportunity to instill a commonsense approach to protecting our water quality and related resources; one that steers clear of creating certain havoc in surface water operations throughout the country by clarifying that man-made ditches are not jurisdictional. Unfortunately, the proposed WOTUS rule is ambiguous and will lead to uncertainty and litigation. We urge you to consider the appropriate protections already afforded U.S. waters under the CWA, particularly via existing state programs. Please reject the unprecedented Federal expansion proposed in this rule, and instead find ways to streamline current CWA administration.

Western family farmers and ranchers urge *clarity*, not ambiguity and expansion of the Clean Water Act.

U.S. FOREST SERVICE DIRECTIVE ON GROUNDWATER MANAGEMENT

On May 6, the U.S. Forest Service (USFS) released two separate notices and distinct sets of directives dealing with water resources. The directives, based on provisions found in the 2012 Forest Planning Rule would open the door to even more regulation of national forests in the name of "water quality protection." Our comments will focus on the draft directive where USFS proposes to assert authority over groundwater—Chapter 2560 ("Groundwater Resource Management") of Forest Service Manual 2500. However, we would also alert the subcommittee of the second USFS directive, which would put in place a set of national Best Management Practices (BMPs) for water quality management from non-point sources. The BMPs proposed by the USFS are vaguely written, giving individual forests virtually free rein to create their own BMPs in as strict or lax a manner as they choose. For example, those guidelines call for "special consideration" of areas within 150 feet of a stream—leaving the interpretation of "special consideration" wide open for litigation. Based on the experience of many Alliance members, we can expect certain conservation groups to conclude that a forest's BMPs are too lax and sue based on their own interpretation of the national BMP guidelines.

The USFS has proposed a new chapter for its Forest Service Manual on managing groundwater resources. As discussed above, many Alliance members have focused attention in recent months on the EPA/Corps rulemaking effort intended to clarify which "Waters of the U.S." would come under jurisdiction of the CWA. Meanwhile, directives that are perhaps even more draconian than what EPA is contemplating are already being forwarded by USFS through the public review process. The new groundwater management and water quality BMP directives USFS has proposed are alarming, and would open up the door to a jurisdictional expansion that would most likely conflict with the laws of western states. Notably, the Groundwater Directive automatically assumes that groundwater and surface water are hydraulically connected, unless demonstrated otherwise using site-specific information.

We believe the USFS cannot assume to hold the reserved water rights to all waters—both surface and groundwater—in a National Forest, and as such, does not have the authority to control or regulate those waters, as proposed in the directives. Where such reserved rights are actually held by the USFS (obtained through a McCarran Act state adjudication of such rights), then the proper authority to control or regulate those rights would be through existing state water right administration processes, not through the policy directives of the USFS.

The USFS is becoming more and more aggressive in the world of western water resource management. In recent years, the agency has attempted to require the transfer of privately held water rights to the Federal Government as a permit condition on USFS lands. Additionally, USFS has leveraged western water users in an effort to acquire additional water supplies for the government by requiring water users to apply for their rights under state law in the name of the United States, rather than in the name of the beneficial user of those rights, despite objections from elected officials, business owners, private property advocates and a U.S. District Court ruling. Finally, our members in Colorado are still battling with the USFS and the U.S. Bureau of Land Management on the agencies' Joint Land Management Plan, which includes more restrictive "standards" to assess stream conditions in a permitting process that will likely lead to by-pass flows. Any by-pass flows that could be imposed in a special use permit process should be considered a "takings" and could have major impacts on existing and future water rights. Colorado water districts, the Colorado Department of Natural Resources, and the Colorado Water Congress appealed the Record of Decision on the Forest Plan, but recently found out the appeal had been denied by the USFS. All of these entities have requested a discretionary review of these matters. If the review is not successful, litigation is a possibility on the by-pass issue.

Thankfully, with the leadership from your subcommittee, the House has passed the "Water Rights Protection Act", which would put a halt to the conditioning of permits and leases on the transfer, relinquishment, or other impairment of any water right to the United States by the Secretaries of the Interior and Agriculture. The latest release of the new USFS directive, however, is seen by some as a way skirting the District Court decision that prevents USFS from forcing water-rights holders to hand over part of their water rights in exchange special use permits. Why is the Groundwater Directive troubling to western water users? We have worked with our membership and have identified the following concerns.

The proposed directive goes beyond the authority of USFS and could encroach into states' rights to manage groundwater. A significant portion of the USFS directive is dedicated to listing numerous Federal statutes that direct or authorize water or watershed management on NFS lands. The directive states that "several of these statutes" grant authority or provide direction to the Forest Service for the management of groundwater resources. Actually, very few of them specifically grant USFS groundwater management authority, and those that do are passive in nature. Forest Service Directive FSM 2880 provides direction on inventorying and monitoring groundwater resources. USDA Departmental Regulation 9500–8 (DR 9500–8) provides for protection of water users and the natural environment from exposure to harmful substances in groundwater and enhancement of groundwater quality where appropriate through prudent use and careful management of potential contaminants and promotion of programs and practices that prevent contamination. In fact, DR 9500–8 specifically notes that USDA will "advocate and foster programs, activities and practices that can prevent the harmful contamination of ground water from agricultural, silvicultural, and other rural sources *to minimize, or make unnecessary, regulatory restrictions* on the use of chemicals essential to agricultural production" (emphasis added).

The new directive is much more aggressive in its management approach, and opens the potential for conflict with state and local groundwater management efforts. Our experience shows that the best decisions on water issues are made at the local level. The Federal Government has repeatedly recognized this fact. In 1952, Congress passed the McCarran Amendment. This law specifically waives the sovereign immunity of the United States in matters that pertain to state water right adjudications.

One of our primary concerns about the USFS Groundwater Directive is how this new directive may affect claims for reserved water rights by the USFS. For example, there are a number of cases that were filed in the mid-1970s for reserved water rights in Water Division 7 (which is basically all of southwest Colorado). These cases have never been resolved, and are still pending in water court. Our members in Colorado have concerns that the USFS could try to amend these pending applications to include references to groundwater, based on the new directive. We hope the subcommittee can assist with having USFS explain what the impact, if any, the proposed directive on groundwater will have on pending reserved water rights claims in Colorado and elsewhere in the West, where reserved water rights claims by the USFS have not been resolved.

One of the objectives of the new directive is to "manage groundwater underlying NFS lands cooperatively with States". The proposed policy directs USFS to manage groundwater quantity and quality on NFS lands "in cooperation" with appropriate state agencies and, if appropriate, EPA. Cooperation is certainly a key component to groundwater management, but USFS needs to demonstrate a stronger commitment to work within the framework of existing state water rights systems and defer to the states in these matters. Such a commitment would encourage states and water right holders to proactively address water allocation issues by eliminating the now omnipresent fear that a subsequent Federal mandate will either undermine local efforts to address an allocation issue or suddenly require unexpected additional reallocations of water which render local cooperation impossible.

The directive expands USFS jurisdiction beyond National Forest Service lands. One of the policies of the USFS directive is to manage surface water and groundwater resources as hydraulically interconnected, and consider them interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise using site-specific information. Another policy would focus groundwater resource management on those portions of the groundwater system that if depleted or contaminated, would have an adverse effect on surface resources or present or future uses of groundwater. Since surface water and groundwater are already assumed to be hydraulically connected in this directive, this essentially expands USFS jurisdiction to some uncertain range downstream along runoff channels and streams originating or flowing through NFS lands. Not only is the breadth of the jurisdictional expansion uncertain, the manner in which groundwater will be "managed" is also unclear. Groundwater management can consist of passive activities, such as data collection and well monitoring. It can also consist of more aggressive actions, including regulation or curtailment of pumping. The directive fails to adequately describe the level of groundwater management that is proposed, instead noting that management will occur "on an appropriate spatial scale". The policy directs the USFS to "prevent, minimize, or mitigate, *to the extent practical*, adverse impacts from Forest Service actions on groundwater resources and groundwater-dependent ecosystems located on NFS lands." This too, is vague, as are other provisions in the

directive, and potentially could usurp the authority of the state in managing and regulating its surface and groundwater resources.

The directive includes vague and uncertain terminology and provisions. The new policy requires implementation of water conservation strategies in Forest Service administrative and recreational uses and cites FSM 7420. This latter document relates to drinking water projects and it is unclear how it would apply to ensuring incorporation of "water conservation strategies" for administrative and recreational uses. The term "water conservation strategies" needs to be defined.

The directive calls for USFS to follow applicable state and EPA SDWA regulations for evaluating whether a groundwater source of drinking water is under the direct influence of surface water. This would appear to conflict with the USFS policy in the directive that automatically considers groundwater and surface water to be hydraulically interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise using site-specific information.

The directive states that effects of proposals on groundwater resources will need to be considered and addressed when revising or amending applicable land management plans and evaluating project alternatives. The directive is not clear as to whether these actions apply only to proposed USFS activities or to proposed uses involving surface water or groundwater outside of USFS lands that could theoretically be viewed as "connected" using the new USFS policy.

The directive is biased against human activities and discourages a flexible approach to water management contains a strong bias toward the environment and water demand management. The Forest Service directive proposes to address in planning documents the long-term protection and sustainable use of groundwater and groundwater-dependent resources on USFS lands. The policy directs USFS to appropriately protect groundwater resources on USFS lands that are critically important to surface water resources or to natural features, ecosystems, or organisms. No mention is made of the need to provide water for grazing, recreation, or other human activities on USFS lands.

Several parts of the proposed directive demonstrate a bias against human activities and water infrastructure projects on USFS lands:

- The proposed policy directs USFS to deny proposals to construct wells on or pipelines across USFS lands which can reasonably be accommodated on non-USFS lands and which the proponent is proposing to construct on USFS lands because they afford a lower cost and less restrictive location than non-USFS lands.
- In lieu of accessing water from USFS lands, the directive encourages public water suppliers and other water users to employ new treatment technology to meet water supply needs when water quality in an existing water source has degraded or become polluted.
- When issuing or reissuing an authorization or approving modification of an authorized use, the directive requires implementation of water conservation strategies to limit total water withdrawals from USFS lands "deemed appropriate by the authorized officer".
- The directive requires that public water suppliers and other proponents and applicants for authorizations involving water supply facilities on USFS lands provide an evaluation of all other reasonable alternatives to the USFS before authorizing access to new water sources or increased capacity at existing water sources on USFS lands, unless the proposed use is entirely on USFS lands or the proponent or applicant is a public water supplier and the proposed water source is located in a designated municipal watershed.

The USFS directive suggests to us that some within the agency clearly have anti-infrastructure biases and are inserting those biases into critical Federal decision-making processes. The Alliance has been very supportive of increased water use and management efficiencies, including the many voluntary water conservation projects currently implemented across the West. We also believe that to effectively meet future demands for water for people and the environment in the West, water conservation efforts alone will not suffice, and that water infrastructure, including new water storage projects, must be built in the future.

The directive demonstrates a bias against water storage projects that could hamper future ability to address drought and climate change challenges in the West. Western snow-fed, irrigated agriculture will take on more importance to the Nation as climate change sparks more extremes in both flooding and droughts. In the West, we have high elevation moisture, and sophisticated storage and conveyance infrastructure, which make us more flexible and adaptive in our water management efforts. Western agricultural water users and the infrastructure that was originally constructed to support our communities will become even more important as climate

changes occur. An essential part of water management in the West lies in the past: visionary development of storage and irrigation under the auspices of the Bureau of Reclamation. This has allowed the bountiful production of food and fiber which are crucial to our national food supply. The importance of dams and water delivery infrastructure to western water supply certainty appears to have been forgotten as USFS prepared this directive.

Interestingly—and what is surprising, coming from an agency like USFS—the directive proposes to protect local groundwater resources by encouraging the use of sources of water other than local groundwater, or "import surface or groundwater from outside the basin where laws, water quality and hydrological conditions in both the source and receiving areas allow". Is USFS actually advocating for expanded trans-basin diversions to avoid using local groundwater?

The USFS directive would place unqualified personnel in positions where critical groundwater management decisions will be made. The directive defines "qualified groundwater personnel" as USFS staff or contractors with "appropriate education, training, and experience in groundwater science to satisfy project needs and, if applicable, licensed or registered to practice geology, hydrology, soil science, or engineering, as appropriate." However, other provisions of the directive provide aquatic biologists, or "similarly trained professionals" with the authority to analyze whether groundwater withdrawals or injections would impact surface or groundwater quality and quantity. These professionals would also be authorized to develop analyses used to change or limit authorized activities and modify operations for those cases where monitoring shows potential impacts. These are very complicated, sophisticated duties that are likely beyond the training and experience obtained by aquatic biologists. Qualified groundwater personnel should oversee these activities, and those personnel should be state-licensed professional civil engineers or geologists.

The Alliance has many concerns with the USFS groundwater management directive, but our biggest worry with this most recent move by the USFS to assert control over groundwater is that it unquestionably exceeds the agency's statutory authority. Unfortunately, in recent years, similar actions by the USFS suggest a move toward Federal overreach, ignoring state water laws and processes, and violating private property rights. The USFS proposed directives on groundwater management and water quality Best Management Practices both need to be withdrawn, and USFS should go back to the drawing board and work toward developing a policy that falls within the limits of agency authority, pays deference to states water authorities and emphasizes a collaborative approach to water management that benefits human uses and the environment.

CONCLUSION

One not familiar with this Nation's regime for regulation of the environment would understandably conclude that there is some giant gap in the regulatory scheme that is allowing unchecked pollution and waste of water that are not currently within the jurisdiction of the CWA or the purview of the USFS. However, this is simply not the case. Even though groundwater, smaller intrastate waters and wetlands areas may not be within the jurisdiction of the Federal Government, they *are* within the jurisdiction of state and local governments. The implication derived by the perceived need by the Federal Government to further regulate all waters is that these state and local governments are incapable of, or somehow ignoring the need to effectively protect their water resources. Such arrogance by the Federal agencies is appalling and flies in the face of federalism in promoting state governance of these important resources. In addition, it is important to keep in mind that the Federal Government does have jurisdiction over discharges of solid wastes, hazardous wastes, and hazardous substances to non-jurisdictional waters through the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation, and Liability Act.

It is also worth noting that the CWA is widely recognized as an extremely successful statutory regime. All of this progress has been achieved under the current version of the CWA. And more than a decade's worth of this progress has been achieved since the Supreme Court's *SWANCC* decision in 2001, which some proponents of the proposed rulemaking allege was the beginning of the Court's attempts to limit Federal jurisdiction. Simply put, the agencies crafting both of these rules have only spoken of the need for an expansion of Federal water resource management jurisdiction in the broadest, most vague terms possible, without establishing any real need.

The results of this jurisdictional expansion will put actions and products used by American farmers and ranchers that are critical inputs necessary in the production

of food and fiber foremost in the sights of Federal regulators. American family farmers and ranchers for generations have grown food and fiber for the world, and we will have to muster even more innovation to meet this critical challenge, which grows every day. That innovation must be encouraged rather than stifled with new regulations and uncertainty. Unfortunately, many existing and proposed Federal policies on water issues,—including proposed rules discussed in this letter—make it more difficult for farmers to produce food and fiber in an arena where agricultural values are perceived as secondary to ecological and environmental priorities. Right now, it seems that water policies being developed at EPA, the Corps and the USFS are being considered separately from foreign and domestic agricultural goals.

Thank you for this opportunity to provide comments for this important oversight hearing.

PREPARED STATEMENT OF NATIONAL STONE, SAND AND GRAVEL ASSOCIATION (NSSGA)

On behalf of the National Stone, Sand and Gravel Association, we appreciate the opportunity to submit testimony to the Natural Resources Subcommittee hearing on "New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs" on the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proposed rule defining the scope of waters protected under the Clean Water Act (CWA) (Docket ID No. EPA–HQ–OW–2011–0880).

NSSGA is the world's largest mining association by product volume. NSSGA member companies represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel consumed annually in the United States, and there are more than 10,000 aggregates operations across the United States.

Through its economic, social and environmental contributions, aggregates production helps to create sustainable communities and is essential to the quality of life Americans enjoy. Aggregates are a high-volume, low-cost product. Due to high product transportation costs, proximity to market is critical; unlike many other businesses, we cannot simply choose where we operate. We are limited to where natural forces have deposited the materials we mine. There are also competing land uses that can affect the feasibility of any project. Generally, once aggregates are transported outside a 25-mile limit, the cost of the material can increase 30 percent to 100 percent, in addition to creating environmental and transportation concerns. Because so much of our material is used in public projects, any cost increases are ultimately borne by the taxpayer.

Aggregates are the chief ingredient in asphalt pavement and concrete, and are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. Aggregates are used for many environmental purposes, including pervious pavements and other LEED building practices, the treatment of drinking water and sewage, erosion control on construction sites, and the treatment of air emissions from power plants. Aggregates operations are returned to the community as a variety of positive land uses from wetlands to lakes, wildlife habitats, recreational centers and even amusement parks and golf courses. While Americans take for granted this essential natural material, they are imperative for construction of our infrastructure, homes, and for positive growth in our communities.

As the industry that provides the basic material for everything from the roads on which we drive to purifying the water we drink, NSSGA members are deeply concerned that the EPA's proposed rule will stifle our industry at a time when we are just now recovering from the economic downturn. The aggregates industry removes materials from the ground, then crushes and processes them. Hazardous chemicals are not used or discharged during removal or processing of aggregates. When aggregates producers are finished using the stone, sand or gravel in an area, they pay to return the land to other productive uses, such as residential and business communities, farm land, parks, or nature preserves.

Over the past 8 years, the aggregates industry has experienced the most severe recession in its history. This expansion of jurisdiction will have a severe impact on industry by increasing the costs and delays of the regulatory process, causing further harm to an industry that has seen production drop by 39 percent since 2006. While stone, sand and gravel resources may seem to be ubiquitous, construction materials must meet strict technical guidelines to make durable roads and other public works projects. Because many aggregate deposits were created by water, they are often located near water. The availability of future sources of high quality aggre-

gates is a significant problem in many areas of the country and permitting issues has made the problem worse.

The aggregates industry requires large land areas to process and remove the extensive quantities of material needed for public works projects. This proposed rule could effectively place many areas "off limits" due to cost of new permits and/or the mitigation required to off-set losses to now regulated streams. Having a clear jurisdictional determination for each site is critical to the aggregates industry. These decisions impact the planning, financing, constructing and operating aggregates facilities. Because the Clean Water Act 404 "dredge and fill" permitting process and the corresponding states' 401 Certification process is so long and costly that many companies attempt to avoid jurisdictional areas.

Under the proposed revisions, many previously non-jurisdictional areas like floodplains, wet weather conveyances, upland headwaters, ephemeral streams or any riparian area could be considered jurisdictional. It will make nearly any area our members try to access regulated and in need of additional permits.

Even obtaining a jurisdictional determination can be a significant undertaking. While jurisdictional determinations are good for 5 years, as an industry we make business decisions to buy or lease properties to extract aggregates for very long terms, 15 to 30 years is not uncommon. The companies in our industry are very concerned that past understandings of what would be jurisdictional will now be subject to review. A change in what is considered jurisdictional can have significant impacts on our material reserves, which will affect the life of our facilities and delay the startup of new sites. Ultimately this change will disrupt the supply of aggregates to our biggest customers, government agencies; thus affecting highway programs, airports, and municipal projects.

EPA claims this rule change is needed because so many waters are unprotected, but that is not true: states and local governments have rules that effectively manage these resources. For example, states and many municipalities regulate any potential negative impacts to storm water runoff and require detailed storm water pollution prevention plans. These plans are required for every project; both during construction and continuously after operations begin. States and local governments are best-suited to make land use decisions and balance economic and environmental benefits, which is what Congress intended.

There is much inefficiency in the current regulatory system; however, adding vague terms and undefined concepts to an already complicated program is not the way to fix the problem. In some cases this rule could have a negative effect on the environment and safety. Ditches without maintenance can degrade and lead to increased erosion and sediment problems. EPA claims this rule is based on sound science, but the Science Advisory Board, the group of independent scientists reviewing it, are still not near completion; in fact they have raised serious questions EPA has not answered.

EPA's economic analysis of this rule does not accurately show what businesses will end up paying if this rule is finalized. It is not even close. One NSSGA member calculated that to do the additional mitigation of a stream required under this rule would be more than $100,000; this is just for one site in our industry. This is more than EPA has estimated the stream mitigation costs are for entire states in its economic analysis. For our industry, time is money. Any new requirements lead to a long learning curve for both the regulators and the regulated. Simply receiving a jurisdictional determination can take months—permits can take years; how much longer will it take to break ground with so many vague and undefined terms in this rule? The proposed rule has no clear line on what is "in" and what is "out," making it very difficult for our industry and other businesses to plan new projects and make hiring decisions.

If it is determined development of a site will take too long or cost too much in permitting or mitigation, then the aggregates industry won't move forward. That means a whole host of economic activity in a community will not occur—all of this in the name of protecting a ditch or farm pond.

Taken further, a significant cut in aggregates production could lead to a shortage of construction aggregate, raising the costs of concrete and hot mix asphalt products for state and Federal road building and repair, and commercial and residential construction. NSSGA estimates that material prices could escalate from 80 percent up to 180 percent. As material costs increase, supply becomes limited, which will further reduce growth and employment opportunities in our industry. Increases in costs of our materials for public works would be borne by taxpayers, and delay road repairs and other crucial projects. Given that infrastructure investment is essential to economic recovery and growth, any change in the way land use is regulated places additional burden on the aggregates industry that is unwarranted and would adversely impact aggregates supply and vitally important American jobs.

Additionally, EPA conducted no state outreach prior to releasing this proposed rule, and little to no outreach after the fact. States and localities will bear an enormous financial burden under this rule, as it will affect construction, recreation facilities, and even maintenance of roadside ditches. EPA should have consulted with the states prior to proposing the rule in order to incorporate local needs and capabilities.

We urge that EPA withdraw this rule until a more thorough economic analysis has been performed, a Small Business Regulatory Flexibility Act (SBRFA) panel has been conducted, the states and affected communities have been consulted, and the Science Advisory Board has finished their analysis and allowed stakeholders to comment on their conclusions. Without a thorough outreach to affected communities—which EPA has not conducted—this rule will harm not only aggregates operators and our transportation infrastructure, but the economy as a whole.

NSSGA appreciates this opportunity to submit a statement on the devastating effects of a broad expansion of Clean Water Act jurisdiction on the aggregates industry.

PORTLAND CEMENT ASSOCIATION,
WASHINGTON, DC,
JUNE 24, 2014.

Hon. DOC HASTINGS, *Chairman*,
Hon. PETER DEFAZIO, *Ranking Member*,
House Natural Resources Committee,
Washington, DC 20515.

Hon. TOM MCCLINTOCK, *Chairman*,
Hon. GRACE F. NAPOLITANO, *Ranking Member*,
House Subcommittee on Water and Power,
Washington, DC 20515.

DEAR CHAIRMAN HASTINGS, RANKING MEMBER DEFAZIO, SUBCOMMITTEE CHAIRMAN MCCLINTOCK AND RANKING MEMBER NAPOLITANO:

Thank you for holding today's hearing, entitled, "New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs." The Portland Cement Association (PCA) represents twenty-seven (27) cement companies operating eighty-two (82) manufacturing plants in thirty-five (35) states, with distribution centers in all fifty (50) states, servicing nearly every congressional district. PCA members account for approximately eighty (80) percent of domestic cement-making capacity. On behalf of PCA, I wish to share the views of America's cement manufacturing industry.

PCA has serious concerns with the proposed changes to the Clean Water Act and the economic ramifications the rule would have on the building and construction sectors. The interpretative effects of the rule would directly impact domestic cement production as plant operators determine the new law's jurisdiction on their property. In terms of production, the cement industry is regional in nature. Most cement manufacturing plants are located in rural areas near limestone deposits, the principal ingredient in producing cement. Cement manufacturing is a capital-intensive industry, and manufacturing sites are constructed near limestone deposits where possible with the presumption that the mineral will continue to be accessible. PCA is concerned that the proposed rule would prevent facilities from fully accessing these limestone deposits. At a minimum, the rule would require hydrological and geological surveys and increased layers of regulation that are costly and time consuming.

Land developers also would be more susceptible to citizen lawsuits challenging local actions based on regulations that are poorly defined. Increased project delays and production costs for critical infrastructure and commercial development projects would be severe and damaging to a sector that continues to recover from the severe economic downturn.

America's cement manufacturers urge lawmakers to communicate industry concerns to the Environmental Protection Agency and the U.S. Army Corps of Engineers. PCA supports measures, including legislation, that address industry concerns, including withdrawal of the rule and limitations on funding to implement the rule.

Thank you for holding today's hearing. PCA looks forward to working with you and members of the committee on this important issue.

Sincerely,

CARY COHRS,
Chairman of the Board.

TROUT UNLIMITED,
ARLINGTON, VA,
JUNE 25, 2014.

Hon. TOM MCCLINTOCK, *Chairman*,
Hon. GRACE F. NAPOLITANO, *Ranking Member*,
House Subcommittee on Water and Power,
Washington, DC 20515.

Re: June 24 hearing on "New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs"

DEAR CHAIRMAN MCCLINTOCK AND RANKING MEMBER NAPOLITANO:

I write on behalf of Trout Unlimited and its 155,000 members to comment on Federal policies regarding water resources, specifically the Forest Service's Proposed Directive for Groundwater Resource Management and the Administration's Clean Water Act jurisdiction rulemaking. The title of the hearing suggests that Federal policies have a negative influence on jobs and recreation. To the contrary, the aforementioned directive and rulemaking are designed to protect the clean water that provides for fishing, hunting, and other forms of outdoor recreation and substantial numbers of jobs and economic activity generated through those activities.

Each year, 47 million Americans head into the field to hunt or fish. These are not simply traditions or hobbies—they are fundamental components of our Nation's economy. The money sportsmen spend in pursuit of their passion supports everything from major manufacturing industries to small businesses in communities across the country. The economic benefits of hunting and angling are especially pronounced in rural areas, where money brought in during the hunting season can be enough to keep small businesses operational for much of the year. These expenditures directly and indirectly support more than 1.5 million jobs in every corner of the country and ripple through the economy to the tune of $200 billion per year. Many other forms of outdoor recreation also depend on clean water and a healthy environment. According to the Outdoor Industry Association, boating, including canoeing and kayaking, had a total economic impact of $206 billion in 2012 supporting 1.5 million jobs.

Forest Service's Proposed Directive for Groundwater Resource Management

The Forest Service Organic Administration Act directs the agency to secure "favorable conditions of water flows." 16 U.S.C. § 473, 475 (1897). The proposed Groundwater Directive is an essential step toward fulfilling the agency's fundamental statutory mandate. TU applauds the Forest Service for taking this step to become the steward for supplies of fresh water for future generations that the Organic Administration Act contemplated in 1897.

The hydrologic connection between groundwater and river systems is increasingly recognized as a key component to sustainable water management. Western states in particular have begun to integrate groundwater concerns with surface water management. The Forest Service has a role to play in sustainably managing water resources and ensuring fresh water supplies into the future. The Multiple-Use Sustained-Yield Act (MUSYA)—which recognizes watershed protection as one of five co-equal purposes of National Forests nationwide—authorizes the Forest Service to cooperate with state and local government agencies and other interested parties to advance management efforts. 16 U.S.C. § 528, 528, 530 (1960).

The Forest Service plays a major role in minimizing both water filtration costs for downstream communities and flooding by managing healthy landscapes that allow rivers to connect to their floodplains. Prior to the proposed directive the Forest Service has not had a policy that provides comprehensive direction for management of groundwater resources on national forest lands. A national groundwater policy helps to clarify responsibilities for groundwater resource management at each level of the Forest Service.

Because existing Forest Service water policy is limited to surface water, the agency's ability to address watershed-scale adaptation issues is seriously hampered. For example, groundwater leaking into mining works, and the resulting dewatering of streams due to interception of groundwater inflows, can cause serious problems. This can be mitigated with liners and patch-like corking at points of groundwater intrusion. Groundwater is an integral component of the hydrological cycle in all watersheds. The Forest Service's proposed directive fills a major gap in existing agency resource management policy.

Based on TU's extensive work with state-held water rights and water policy, we believe the Forest Service can amend the existing Forest Service manual to recognize the hydrologic connection between surface water and groundwater while respecting state-managed water allocation procedures. This can be done without imposing any new requirements on holders of state-issued water rights, and without changing the way state groundwater or surface water quality regulations affect national forests and grasslands.

Clean Water Act Jurisdiction and Waters of the United States Rulemaking

The Environmental Protection Agency and Army Corps of Engineers have proposed a rule to clarify the jurisdiction of the Clean Water Act. Even though these agencies are outside the subcommittee's jurisdiction we offer the following comments to share our position on the proposed rule. TU strongly supports the proposed rule because it will clarify and strengthen the very foundation of the Clean Water Act's protections for important fish and wildlife habitat. Based on our long experience working in the field with the Clean Water Act, and the detailed analysis completed by the agencies and OMB for the proposal, we believe that the new rule is worthy of thoughtful engagement through the recently extended comment period. The proposed rule will provide landowners, conservationists, and businesses with substantial improvements in how the law is implemented.

The Clean Water Act is very valuable to TU. Our mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. Our volunteers and staff work with industry, farmers, and local, state and Federal agencies around the Nation to achieve this mission. On average, each TU volunteer chapter annually donates more than 1,000 hours of volunteer time to stream and river restoration and youth education. The Act, and its splendid goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" serves as the foundation to all of this work. Whether TU is working with farmers to restore small headwater streams in West Virginia, removing acidic pollution caused by abandoned mines in Pennsylvania, or protecting the world famous salmon-producing, 14,000-jobs-sustaining watershed of Bristol Bay, Alaska, the Clean Water Act is the safety net on which we rely.

The Clean Water Act has yielded positive results over the past 40 years. When the Clean Water Act was first enacted, many of Ohio's waters, such as Lake Erie and the Cuyahoga River, were so polluted that the goal of making these waters "fishable and swimmable" was nearly unthinkable in some locations. Similarly, Long Island Sound and many New York waterways were plagued by pollution problems. More than 40 years later, Lake Erie hosts thriving steelhead and other sport fisheries, the Carmans River on Long Island hosts one of the most unique brook trout fisheries in the eastern United States, and Montauk is a world class saltwater fishing destination. These successes would not have been possible without the Clean Water Act.

Unfortunately, the Nation's clean water safety net is broken, and if you appreciate clean water and the Clean Water Act, then you will appreciate the agencies' efforts to resolve the law's most fundamental question: which waters are—and are not—covered by the Clean Water Act.

Over the last 15 years a series of Supreme Court decisions have confused these protections. The agencies' proposal takes important steps to clarify and restore protections to intermittent and ephemeral streams that may only flow part of the year. These intermittent and ephemeral streams provide habitat for spawning and juvenile trout, salmon, and other species, and protecting these streams means protecting the water quality of larger rivers downstream. Thus, sportsmen strongly support the reasonable efforts embodied in the proposal from the agencies to clarify and restore the protection of the Clean Water Act to these bodies of water where we spend much of our time hunting and fishing. Because of the uncertainties caused by the Supreme Court cases, a rulemaking was sought by many business interests, as well as by Supreme Court Chief Justice Roberts who presided over the *Rapanos* case.

The proposed rule works to clarify what waters are not jurisdictional. The proposed rule and preamble reiterates all existing exemptions from Clean Water Act jurisdiction, including many farming, ranching, and forestry activities. These exemp-

tions include activities associated with irrigation and drainage ditches, as well as sediment basins on construction sites. Moreover, for the first time, the proposed rule codifies specific exempted waters, including many upland drainage ditches, artificial lakes and stock watering ponds, and water filled areas created by construction activity. TU works with farmers, ranchers, and other landowners across the Nation to protect and restore trout and salmon habitat. We have a keen interest in ensuring that the proposal works well for landowners, on the ground, and on their properties.

Last, we highlight the great, and direct, benefit that clean water and healthy watersheds provide to your districts and state. For example, California's Water Action Plan prioritizes increasing protection for small headwater streams because watersheds in the Cascades, Sierra Nevada and other forested areas of the state are the places of origin for more than two-thirds of the state's developed water supply. Just this month the state legislature and Governor's office reached a budget deal that will bring new investment into headwaters and mountain meadow restoration for purposes of water supply reliability. Water originating in the Cascades and Sierra Nevada supplies all or part of the need for 23 million Californians and millions of acres of agricultural land. Up to one-half of the fresh water flowing into the Delta begins as snow and rain in these watersheds. The protections afforded by the Clean Water Act are needed now more than ever.

Forty years after enactment the Clean Water Act has come to a major crossroads. The agencies authorized by the Transportation and Infrastructure Committee and full Congress to implement the Act, spurred by the Supreme Court itself and a wide range of stakeholders, have put forth a proposal that will help strengthen the very foundation of the law for years to come.

Sincerely,

STEVE MOYER,
Vice President for Government Affairs.

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE COMMITTEE'S OFFICIAL FILES]

Letter dated June 19, 2014, from Rep. Napolitano to Gina McCarthy, Environmental Protection Agency

Memorandum of Understanding between the State of Wyoming State Engineer's Office and the USDA Forest Service, Rocky Mountain Region 2 and Intermount Region 4, submitted by Patrick Tyrrell, Wyoming State Engineer

Testimony given at a Joint Roundtable Hearing held on June 2, 2014 in Phoenix, AZ, ″Full Disclosure: What the EPA's Water Rule Means for Arizona"

—Schweikert, Hon. David, Chairman of the House Science, Space, and Technology Subcommittee on the Environment

—Smith, Hon. Lamar, Chairman, House Science, Space, and Technology Committee

—Franks, Hon. Trent, a Representative in Congress from the State of Arizona

—Griffin, Hon. Gail, a Senator from the State of Arizona, Chairman of the Senate Government and Environment Committee

—Salmon, Hon. Matt, a Representative in Congress from the State of Arizona

—Engel, Dr. Kirsten, University of Arizona

—Hinck, Matthew, Arizona Rock Products Association

—Kamps, Spencer, Home Builders Association of Central Arizona
—Lacey, Michael J., Arizona Department of Water Resources
—LaSlavic, Nicole, National Association of Realtors
—Lynch, Robert S., Irrigation and Electrical Districts' Association of Arizona
—Mendoza, Gregory, Governor, Gila River Indian Community
—Norton, Kelly, Arizona Mining Association
—Smallhouse, Stefanie, Arizona Farm Bureau
—Urton, J. Michael, San Carlos Irrigation and Drainage District, June 27, 2014 Letter

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